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Nos. 15-1358, 15-1359 & 15-1363

IN THE

# Supreme Court of the United States

JAMES W. ZIGLAR,

*Petitioner,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

**On Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit**

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JOHN D. ASHCROFT, *et al.*,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

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DENNIS HASTY, *et al.*,

*Petitioners,*

v.

AHMER IQBAL ABBASI, *et al.*,

*Respondents.*

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## QUESTIONS PRESENTED

1. Whether this action for damages against federal officials for violating the constitutional rights to due process of law and equal protection of the laws of persons detained in a federal correctional facility may proceed under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) and progeny, where this Court has permitted similar actions in the past and where there would be no adequate remedy in the absence of *Bivens*.

2. Whether the detailed factual allegations in this case, which are supported by two Department of Justice Reports and specifically exclude the "obvious alternative explanation" that was relevant in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), state claims under Federal Rule of Civil Procedure 12(b)(6).

3. Whether selecting persons for solitary confinement and other punitive treatment based solely on their race, religion or ethnicity without any basis to suspect a connection to terrorism, violated these individuals' clearly established constitutional rights to due process of law and equal protection of the laws.

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## INTRODUCTION

Respondents are non-citizens who were arrested on civil immigration charges and then held in solitary confinement in a super-maximum security wing of a federal prison, where for months they faced uniquely harsh restrictions, harassment, and abuse. This treatment was not based on any individualized suspicion that Respondents were dangerous or had committed any crime, let alone had some connection to terrorism. Rather, Respondents' mistreatment followed from a policy, crafted at the highest levels of government, to treat harshly Muslim non-citizens of Arab and South Asian descent, based on the false and pernicious assumption that individuals with those characteristics might have some connection to terrorism.

Like numerous plaintiffs before them, Respondents brought a *Bivens* action to seek redress for abuse by federal officials in a federal prison. With detailed factual allegations of the kind not present in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Respondents plausibly allege that the former Attorney General, FBI Director, and INS Commissioner crafted a policy that knowingly consigned Muslim men of Arab or South Asian descent, suspected of nothing but overstaying their visas, to extreme punishment. Separately and independently, Respondents plausibly allege constitutional violations by the warden and associate warden responsible for the details of their ordeal, including abuse well beyond what higher-ranking officials ordered or prison regulations would ever permit. If these claims prove to be unfounded,

Petitioners will have opportunities to escape this litigation, including before trial. But at this early stage, Respondents have done enough to gain entry to the courthouse.

Petitioners emphasize that their actions came in the wake of an extraordinary attack on the United States. But "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). The September 11, 2001 attack was not the first crisis to test our nation's commitment to the rule of law, and it will not be the last. Accountability for the wrongs done to Respondents is critical to ensuring that future officials remember the Constitution is paramount.

## STATEMENT

Respondents filed this lawsuit to seek accountability and redress for flagrant violations of their clearly established constitutional rights. Following this Court's decision in *Iqbal*, Respondents amended their complaint to include detailed factual allegations, identifying the specific role played by each of the Petitioners. In addition to relying on information gathered from earlier stages of discovery in this case and other sources, Respondents bolstered their allegations with two Justice Department reports investigating the misconduct at issue. *See* JA34-335 (Office of Inspector Gen., U.S. Dep't of Justice, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration

Charges in Connection with the Investigation of the September 11 Attacks (Apr. 2003), https://oig.justice.gov/ special/0306/full.pdf ("OIG Report")); JA336-419 (Office of Inspector Gen., U.S. Dep't of Justice, Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York (Dec. 2003), http://www.usdoj.gov/oig/special/0312/final.pdf ("Supplemental OIG Report").[1]

The Second Circuit agreed that Respondents stated plausible claims for relief that should be permitted to move forward.

### A. Round-Up Of Middle Eastern Men

The United States suffered tragic terrorist attacks perpetrated by Al Qaeda on September 11, 2001 ("9/11"). In their wake, the Federal Bureau of Investigation ("FBI") set up a tip line for civilians to supply information. App.265a (¶40).[2] Ninety-six thousand "tips" were received in the first week, most involving nothing more than generic suspicions of Arabs and Muslims. *Id.*; *see also* JA66-68. For example, one of the original plaintiffs in this case came to the FBI's attention based on his landlord's report "that she rented an apartment . . . to several

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[1] Respondents' citations to the Joint Appendix are indicated by "JA#". These citations refer to the OIG Report and Supplemental OIG Report. Citations with a ¶ number refer to paragraphs of the Fourth Amended Complaint.

[2] "App." refers to the Appendix to the Petition for a Writ of Certiorari filed by Petitioners Ashcroft and Mueller (No. 15-1359).

Middle Eastern men, and she 'would feel awful if her tenants were involved in terrorism and she didn't call.'" App.8a n.9 (quoting App.334a (¶251)).

Petitioner Robert Mueller, then the Director of the FBI, departed from prior practice and ordered each of those tips investigated, even if the sole basis of "suspicion" was the individual's religion, ethnicity, country of origin, or race. App.265a (¶40). Petitioner John Ashcroft, then the Attorney General, directed Mueller to vigorously question any male from a Middle Eastern country between the ages of 18 and 40 who came to the FBI's attention. App.265a (¶41). Ashcroft further instructed Mueller to tell the Immigration and Naturalization Service ("INS"), headed by then-Commissioner Petitioner James Ziglar, to round up every immigration violator fitting this profile. *Id.*

The result, as a high-ranking Justice Department official described it, was "custody without triage," with no "vetting" to ensure the law enforcement response was based on something other than ethnicity. App.267a (¶45). As a "variety" of officials explained, "it soon became evident that many of the people arrested . . . might not have a nexus to terrorism." JA109-110; *see also* JA150-151.

Ashcroft and Mueller understood and expected the natural effect of their directives: that many individuals in the targeted religious and ethnic groups would be swept up without any legitimate basis to suspect them of terrorism. App.265a, 267a (¶¶41, 44). Ashcroft, Mueller and Ziglar (the "DOJ Petitioners") received detailed daily reports and were aware that the FBI had no information tying

Respondents to terrorism prior to treating them as "of interest" to the terrorism investigation. App.267a-268a (¶47). Ashcroft followed these arrests particularly closely, receiving a daily "Attorney General's Report" prepared by Ziglar. App.275a (¶¶63, 64).

The complete absence of vetting came to a head in October 2001, when DOJ Petitioners learned the FBI's New York field office was keeping a separate list of non-citizens, including many Respondents and class members, for whom the FBI had not asserted any interest (or lack of interest). App.268a (¶47); *see also* JA123-129. Ashcroft knew of this glaring flaw, yet ordered everyone on this "New York List" treated as "of interest" to the terrorism investigation, with the restrictive treatment that followed. App.267-68a (¶47). That decision overrode significant intra-department criticism. *Id.*

At least 561 men were arrested in New York and New Jersey, far exceeding the capacities of New York-area federal detention centers. App.268a (¶49); JA75. Most were eventually charged with civil immigration violations, some after weeks or even months of detention without charge. App.269a (¶52). Even after final removal or voluntary departure orders, Ashcroft ordered that all non-citizens encountered during the 9/11 investigation be held until cleared of any connection to terrorism. App.270a (¶55). Ashcroft further ordered that these policies be implemented without a paper trail. App.265a (¶39), *see also* JA175-177.

Mueller ordered the clearance investigations run out of FBI headquarters, under his direct control.

App.271a (¶57). He had daily contact with the FBI field offices about the status of individual clearances. *Id.* Even after Respondents were cleared by the field office, Mueller would not authorize their release until their cases were reviewed at headquarters. *Id.*

Eighty-four detainees, including Respondents, were sent to the Metropolitan Detention Center ("MDC"), a federal jail in Brooklyn. App.253a (¶4); JA219. The detainees were not told why they had been singled out; many were informed that they would be deported shortly, consistent with immigration law. App.272a (¶59). Instead, months passed and they remained in isolation, with some concluding they might be held forever. *Id.*

### B. Harsh And Punitive Conditions

In the weeks after 9/11, Ashcroft and Mueller "met regularly with a small group of government officials in Washington and mapped out ways to exert maximum pressure" on the men arrested as a result of their orders. App.274a-275a (¶61). The group decided to restrict detainees' ability to contact the outside world and delay their immigration hearings. App.274a-275a (¶61); *see also* JA72, 220-22. The DOJ Petitioners also directed that officers responsible for interacting with the detainees be told that they were suspected terrorists who "needed to be encouraged *in any way possible* to cooperate." App.274a-275a (¶61) (emphasis added).

Since Respondents' contact with the outside world could not be restricted in a general population unit, and because the Bureau of Prisons ("BOP") did not know whether the detainees posed a threat, the BOP

ordered the detainees held in restrictive confinement. JA220-21. Petitioners Dennis Hasty, then warden of the MDC, and James Sherman, then associate warden for custody (the "MDC Petitioners"), combined existing BOP procedures for administrative detention and disciplinary segregation, to create a new Administrative Maximum Special Housing Unit ("ADMAX SHU"). App.276a-277a, 279a-280a (¶¶68, 75-76). The ADMAX SHU was a solitary confinement unit[3] where detainees were locked in their cells 23 to 24 hours-a-day. When removed from their cells for any reason detainees were placed in handcuffs, shackles, a waist chain, and the physical grip of four guards. App.279a-280a, 289a-290a (¶¶76, 104). BOP regulations do not authorize placing prisoners in prolonged isolation without good cause, but MDC Petitioners ordered it anyway, fabricated the existence of such cause, and ignored regulations mandating periodic review of these conditions. App.276a-277a, 279a (¶¶68, 74).

Along with 23-hour lockdown, MDC Petitioners approved a policy of unprecedented restrictions. Respondents were prohibited from keeping hygiene

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[3] Consistent with many "solitary" confinement units, "double-celling" occurred for some Respondents for some periods of time. *See* U.S. Dep't of Justice, Report and Recommendations Concerning the Use of Restrictive Housing (Final Report) 3 (Jan. 2016), https://www.justice.gov/dag/file/815551/download; JA343. Other Respondents spent their time in complete isolation. *See, e.g.*, App.313a-314a, 315a-316a (¶¶182, 188) (Benatta held for five months in solitary confinement without cellmate); App.329a (¶234) (Bajracharya held for two months in solitary confinement without cellmate).

supplies in their cells, including toilet paper, soap, a toothbrush, toothpaste or a cup for drinking water (App.298a (¶130)); the cells were illuminated all day and night, and guards banged on the bars of their cell doors through the night, depriving them of sleep (App.295a (¶¶119-20)); Respondents were not provided with adequate clothing to take advantage of their opportunity for "recreation," in a cold, barren cage open to the elements (App.296a (¶¶122, 126)); the ADMAX SHU range was so cold during the winter that guards wore jackets, yet the detainees were denied warm clothing and extra blankets (App.297a-298a (¶¶126-27)); they were denied copies of the Koran (App.299a (¶132)); telephone calls and visits were either prohibited or strictly limited (App.281a-282a (¶¶79, 83)); and attorney-client visits, once they occurred, were recorded (App.287-288a (¶98)). Detainees were routinely strip-searched, not just after leaving their cells, but before leaving and sometimes at "random" in their cells. App.292a-300a (¶¶112-18); *see also* JA231-32, 282-89; JA234-37 (photographs of the ADMAX SHU).

Respondents were also abused by MDC guards (App.290a (¶105)), who had been falsely informed that the detainees were connected to the September 11 attacks (App.274a-275a (¶61)). Hasty facilitated this abuse by referring to Respondents as "terrorists" among MDC staff, barring them from normal grievance and oversight procedures, and purposely avoiding the unit. App.280a-281a, 301a (¶¶77, 140). The resulting abuse included slamming the handcuffed and shackled detainees into the wall during transports (breaking Respondent Mehmood's hand), stepping on their shackles and twisting their

hands and fingers, making degrading sexual comments during strip searches, conducting such searches in front of female guards and videotaping them, calling them "fucking Muslims" and "camels," and shouting "shut the fuck up" (or yelling "Jesus") when they prayed. *See* App.290a-294a, 300a, 303a, 307a (¶¶105, 109-10, 115, 136, 147, 162); *see also* JA384-87.

Though Hasty sought to avoid witnessing this abuse, he nonetheless became aware of it. App.259a-260a (¶24); *see also* JA45 (noting media reports of mistreatment soon after detentions began). Videotapes that likely showed abuse were destroyed. App.291a (¶107); *see also* JA406-07.

Like the original decision to round them up in connection with the 9/11 investigation, Respondents' assignment to the ADMAX SHU was not based on any indication of a connection to terrorism. App.253a-254a (¶4). Under Ashcroft's policy, Respondents were to be held in these conditions until cleared by FBI headquarters of any connection to terrorism, although some Respondents languished for months in solitary confinement even after being cleared. App.270a, 274a-275a, 315a-316a, 322a, 326a-327a (¶¶55, 61, 188, 211, 226); JA246.

Those who did not fit Ashcroft's profile had very different experiences. For example, five Israelis detained for allegedly celebrating on 9/11 were held in the MDC, but were allowed visits before Respondents or any other detainees, and were among the first released from the ADMAX SHU, without a clearance letter from FBI headquarters. App.266a-

267a (¶43). Other obviously non-Arab and non-Muslim arrestees were released immediately. *Id.*

### C. Respondents' Experiences

Respondents Ahmer Iqbal Abbasi and Anser Mehmood are Pakistani Muslims related by marriage. App.256a (¶¶13-14). Both came to the attention of the FBI through an anonymous tip that a false social security card had been left at the New Jersey Department of Motor Vehicles by a "male[,] possibly Arab" using Abbasi's address; the card was left by Abbasi's houseguest, but Abbasi was arrested for an immigration violation. App.302a (¶¶143-44). While arresting Abbasi, the FBI came across the name of his sister Uzma, Mehmood's wife. App.306a (¶158). Uzma was caring for their infant son, so Mehmood requested that he be arrested in her place. The FBI agreed, telling Mehmood that he faced only minor immigration charges and would be released shortly. App.306a-307a (¶158-59). Both Abbasi and Mehmood were detained for four months in the ADMAX SHU. App.302a, 305a, 307a, 310a (¶¶145, 152, 162, 170).

Respondent Benamar Benatta is an Algerian Muslim. App.256a-257a (¶15). He was detained by Canadian officials a few days before 9/11 while attempting to enter Canada from the United States to seek refugee status (which was later granted). App.256a-257a, 310a-311a (¶¶15, 172-73). On September 12, 2001, Canadian officials reported Benatta to authorities in the United States, and transported him to New York. App.310a-311a (¶173). Benatta was held at the ADMAX SHU for

over seven months, where he suffered profound effects on his mental health. App.311a, 315a-317a (¶¶174-75, 188, 193). When Benatta was found banging his own head on the cell door, guards beat him, tied him to a metal bedframe in a solitary strip-cell and left in restraints for hours, and then held him without a cellmate for five months. App.313a, 315a-316a (¶¶182, 188).

Respondent Ahmed Khalifa is an Egyptian Muslim who came to the United States for a vacation from his medical studies. App.257a, 318a (¶¶16, 194). He and his roommates were arrested on immigration charges following a tip that several Arabs living at Khalifa's address were renting a post-office box, and perhaps sending out large quantities of money. App.318a (¶195). Khalifa was detained in the ADMAX SHU for close to four months. App.319a-320a, 322a (¶¶200, 204, 211). On one occasion, guards left Khalifa outdoors in a recreation cage for four hours in freezing weather, laughing at him as he repeatedly asked to be brought inside. App.297a (¶125). When the FBI interviewed Khalifa in October 2001, an officer noticed bruises on his wrist and informed Khalifa that he was being abused because he is Muslim. App.319a-320a (¶202). The FBI recorded no suspicions of Khalifa and cleared him shortly thereafter, but Khalifa remained in the ADMAX SHU months longer. App.322a (¶211).

Respondent Saeed Hammouda is also an Egyptian Muslim; he has never learned what led to his arrest. App.257a, 324a (¶¶17, 217); *see* App.326a (¶224). He lawfully entered the United States in 1999 on a business visa and subsequently received a

student visa. App.323a (¶214). He studied marketing and married a United States citizen in 2001, who petitioned for him to receive lawful permanent resident status. *Id.* In October 2001 he was temporarily staying in the Manhattan apartment of a friend when FBI and INS agents arrived, questioned him, and seized some of his friend's property. App.323a (¶215). He was arrested a week later, and charged with working without a visa. App.324a (¶217). Upon arrival at the MDC he was beaten, strip-searched three times, called a "terrorist" and an "Arabic asshole" and taken to the ADMAX SHU. App.324a (¶218). In the winter, Hammouda could not sleep because of the lights in his cell, and because the unit was so cold. App.326a (¶223). He was held in the ADMAX SHU for eight months. App.324a (¶218).

Respondent Purna Raj Bajracharya is a Nepalese Buddhist who overstayed a visitor visa to work and send money home to his family. App.257a, 327a (¶¶18, 229). He came to the attention of the FBI when filming New York streets to show his wife and children. App.328a (¶230). An informant told the FBI that an "Arab male" was videotaping outside a building that contained government offices, leading to Bajracharya's arrest and detention in the ADMAX SHU for three months. App.328a-330a (¶¶230, 232, 234, 237). Bajracharya's relatively short detention was likely the result of intervention on his behalf by the FBI agent assigned to investigate his case, who repeatedly questioned his supervisors as to why Bajracharya remained in the ADMAX SHU after having been quickly cleared of any connection to terrorism. App.329a-330a (¶¶235-36, 238). His

solitary confinement was nonetheless so traumatizing that Bajracharya wept constantly in his cell (for which he was reprimanded by guards), and reported suicidal thoughts. App.331a (¶241).

Redacted versions of Respondents' FBI files were produced in discovery against the United States, and reveal that the FBI never had much interest in Respondents. *See* Letter from Stephen E. Handler, at 4, *Turkmen v. Ashcroft*, No. 02-cv-02307 (E.D.N.Y. July 3, 2008), ECF No. 639. For example, Abbasi was interviewed only once by the FBI, cleared by the New York field office on November 1, 2001, but remained in the ADMAX SHU until February as the New York office repeatedly asked headquarters about Abbasi's status. App.304a-305a (¶¶149-52).

The FBI's lack of any real interest in the detainees was made clear to MDC Petitioners, who were provided regular written updates explaining how each detainee was connected to the 9/11 investigation, along with evidence relevant to any threat each posed. App.277a (¶69). For example, MDC Petitioners were informed that Khalifa was arrested because he was "encountered by INS" while following an FBI lead and charged with a violation of the Immigration and Nationality Act ("INA"), and that the "FBI may have an interest in him." App.277a-278a (¶70). Similarly innocuous information was provided about the others. App.278a-279a (¶¶71-73).

### D. Decision Below

This *Bivens* action was filed in April 2002 by a different group of former detainees held at the MDC and another facility. The case included claims by five MDC plaintiffs against the United States, which agreed to settle for $1.26 million, in exchange for those plaintiffs dropping their claims against the individual defendants. Ex. A to Letter from Rachel Meeropol, *Turkmen v. Ashcroft*, No. 02-cv-02307 (E.D.N.Y. Nov. 16, 2009), ECF No. 687.

Respondents intervened and filed the operative complaint in 2010, adding new and detailed allegations in light of this Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The district court dismissed Respondents' claims against DOJ Petitioners, but denied MDC Petitioners' motion to dismiss.

The court of appeals held that Respondents' claims survived all of the motions to dismiss. Although DOJ Petitioners did not challenge the existence of a *Bivens* remedy on appeal (App.21a), the Second Circuit addressed the issue, holding that a claim of punitive treatment in federal detention "stands firmly within a familiar *Bivens* context." App.25a.

The court of appeals next canvassed the voluminous allegations and found plausible Respondents' constitutional claims. The complaint alleged that DOJ Petitioners were "aware" that immigration detainees were "being detained in punitive conditions of confinement in New York," and knew that "there was no suggestion that those

detainees were tied to terrorism except for the fact that they were, or were perceived to be, Arab or Muslim." App.31a-32a. The court concluded that the OIG Report "supports the reasonable inference that [the lack of suspicion for many detainees], known by other DOJ officials, came to the attention of the DOJ [Petitioners]." App.37a. Without "[i]ndividualized suspicion," the harsh conditions imposed on Respondents were "arbitrary or purposeless" in violation of the Due Process Clause. App.46a.

The court of appeals likewise concluded that the allegations stated a plausible claim for relief under the Equal Protection Clause. The complaint and OIG Report "g[a]ve rise to . . . reasonable inferences" that the FBI in New York targeted individuals "based on race, ethnicity, religion and/or national origin," and Petitioners knowingly merged the New York List with the nationwide list, subjecting individuals suspected of nothing to face the challenged conditions of confinement. App.61a; *see also* App.80a-81a. "[U]nlike in *Iqbal*, there was no legitimate reason to detain [Respondents] in the challenged conditions," and thus "no obvious, more likely explanation" for Petitioners' actions. App.65a-66a.

The Second Circuit recognized that "[d]iscovery may show that" Petitioners "are not personally responsible for detaining [Respondents] in [the alleged] conditions," or that "national security concerns motivated the [Petitioners] to take action." App.84a-85a. But "at this stage," the court could not conclude that individuals "caught up in the hysteria" by reasons of their "perceived faith or race" could

constitutionally be subjected to "[t]he suffering [they] endured." *Id.* Without further development of the facts, the court could not assume that "violation[s] of the constitutional rights on which this nation was built" were justified. App.85a.

With respect to the MDC Petitioners, the court of appeals found plausible claims against Petitioners Hasty and Sherman, but dismissed claims against Warden Zenk, who replaced Hasty as warden of the MDC shortly before the last Respondent was released from the ADMAX SHU. 54a.

The court held that Respondents adequately alleged MDC Petitioners' personal involvement in creating ultra-restrictive conditions of confinement, while knowing that the FBI had not developed any information to tie Respondents to terrorism. App.50a-51a. Punitive intent and discriminatory intent could be inferred from MDC Petitioners' knowing placement of the Muslim detainees in unnecessarily restrictive conditions, their attempts to cover up violations of BOP policy, and their use or allowance of racially and religiously charged language. App.52a-54a, 70a-73a.

Judge Raggi dissented in part from the panel decision, and her dissent was incorporated in full by six judges of the Second Circuit, who dissented from the denial of Petitioners' motions for rehearing. App.86a-163a, 240a-250a.

Every judge on the Second Circuit who considered Respondents' claims agreed that the claim of Hasty's deliberate indifference to physical and verbal abuse could move forward. App.54a-57a, 148a n.41.

## SUMMARY OF THE ARGUMENT

1. a. Respondents were federal detainees who Petitioners subjected to abuse and discrimination in a federal prison in New York. They have only one remedy available to them, one this Court already has recognized and Congress has ratified: a *Bivens* action for damages against federal officers. No extension of this longstanding doctrine is necessary, notwithstanding Petitioners' argument that their unconstitutional conduct involved high-level policy said to implicate immigration and national security.

Even if the Court were to find such an extension required, a *Bivens* remedy is appropriate. This is Respondents' only remedy, and it is necessary to deter federal officials from violating the clearly established constitutional rights of those in civilian custody, and to compensate the victims of such abuse. These factors strongly counsel in favor of recognizing a remedy here, as does the judiciary's expertise in considering due process and equal protection claims. That the unconstitutional policy was created by high-level officials and is claimed to implicate national security and immigration are not "special factors" counseling hesitation. High-level policy can violate the clearly established rights of many, making deterrence against the architects of such policies more important, not less. While Respondents are non-citizens, their claims have nothing to do with immigration enforcement. Nor do they arise in the military context, where the judiciary's review might present separation of powers concerns that implicate national security. Petitioners invoke "national security" in unsworn

briefs, but the complaint alleges they *knew* Respondents were not individually suspected of anything related to terrorism.

b. Respondents' detailed factual allegations state plausible equal protection and substantive due process claims against DOJ Petitioners. The complaint includes factual allegations of a policy by DOJ Petitioners to target Muslim men of Arab and South Asian descent for law enforcement scrutiny, and to hold such men in isolation and treat them harshly, knowing there was no reason to suspect them of ties to terrorism. These factual allegations, not present in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), raise plausible inferences of punitive and discriminatory intent, and cannot be defeated by Petitioners' unsworn alternative explanations, which contradict the complaint.

c. DOJ Petitioners are not entitled to qualified immunity on the pleadings. By 2001, precedent clearly informed federal officials that they could not impose upon detainees arbitrary and purposeless prison restrictions bearing no reasonable relationship to a legitimate governmental interest, and certainly could not single out detainees for such restrictions on the basis of race, religion or ethnicity. DOJ Petitioners' implicit argument is that even without an articulable reason to suspect Respondents of any connection to terrorism, national security justified holding Muslim men of Arab or South Asian descent in restrictive conditions given the "inherent difficulty" of determining who might be a terrorist. Far from stating a legitimate basis for qualified immunity, DOJ Petitioners attempt to

revive the discredited legacy of *United States v. Korematsu*, 323 U.S. 214 (1944).

2. a. Respondents' separate claims against MDC Petitioners survive, regardless of how the Court rules on the claims against DOJ Petitioners. The Court has previously recognized *Bivens* claims against high-ranking Bureau of Prisons officials for mistreatment in federal prisons. Respondents' claims that the warden and associate warden of a federal prison subjected them to harsh conditions of confinement without justification, and based on race, religion and ethnicity, break no new ground. Indeed, every judge to consider the issue has agreed that the claims against Petitioner Hasty, for deliberate indifference to physical and verbal abuse, arise in a familiar *Bivens* context.

b. The Second Circuit also correctly found that the deliberate indifference claim against Hasty is plausible, as the complaint alleges that he willfully blinded himself to abuse, learned of it nonetheless, and failed to correct it.

Respondents' allegations concerning the "official" conditions of confinement also state plausible substantive due process, equal protection, and Fourth Amendment violations. Petitioners point to "FBI terrorism designations" and "binding BOP policy" to avoid the fair inferences raised by their individual decisions to design ultra-restrictive conditions of confinement, but neither the information they received from the FBI, nor BOP policy, provided any justification for the unprecedented and wholly unjustified restrictions they imposed.

MDC Petitioners cannot claim the protection of qualified immunity, because placing civil detainees in restrictive isolation without individualized justification violates BOP policy and clearly established law, as do the other restrictions the wardens designed. Their attempts to cover up their violations of BOP regulations, by falsely claiming the detainees were classified based on the individual danger they posed, supports the clearly established nature of the violations.

3. Petitioners are not entitled to qualified immunity for Respondents' section 1985(3) claim. All federal officers had clear warning in 2001 that they could not engage in unconstitutional discrimination, thus they could not have reasonably believed they could conspire to do so. MDC Petitioners' argument for an intra-corporate conspiracy shield is unsupported and inadequately developed, as the court of appeals found.

## ARGUMENT

### I. Claims Against The DOJ Petitioners Survive A Motion To Dismiss.

#### A. A *Bivens* Remedy Is Available Against Federal Officials Responsible For The Abuse Of Prisoners At A Federal Jail On U.S. Soil.

Although law enforcement officials had no basis for suspecting them of connections to terrorism, Respondents and dozens of other Muslim men of Arab or South Asian descent were isolated in a

super-maximum security wing of a federal prison, and subjected to the harshest conditions permitted in the federal prison system (and worse). A *Bivens* action is their only available remedy, and is critical to ensuring that future law enforcement officers—from prison guards to the Attorney General, and everyone in between—respect the rule of law. If a federal detainee can prove that a federal official, even a high-ranking one, personally violated his clearly established constitutional rights, such a wrong should not go without a remedy.

### 1. The *Bivens* Remedy Is Well Established And Has Been Ratified By Congress.

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court recognized an implied private damages action to remedy constitutional violations by federal officers. Though Mr. Bivens could have sued for compensation under state trespass law, the Court recognized that a federal remedy was needed because a federal officer acting unconstitutionally "possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." *Id.* at 392.

Although *Bivens* involved a claim under the Fourth Amendment, this Court has extended it twice, allowing damages actions under the Eighth Amendment for unconstitutional prison conditions, and under the Fifth Amendment for unconstitutional discrimination. *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).

Congress has consistently ratified this Court's development of common law remedies for constitutional violations. *See generally* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117 (2009). In 1974, when Congress amended the Federal Tort Claims Act ("FTCA") to allow individuals to sue the federal government for certain law enforcement torts, it was "crystal clear that Congress viewed FTCA and *Bivens* as parallel, complementary causes of action." *Carlson*, 446 U.S. at 20; *see also id.* (quoting S. Rep. No. 93-588, at 3 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2789, 2791). In 1988, when Congress passed the Westfall Act to provide for the substitution of the United States for federal officials sued in civil actions, it exempted claims "brought for a violation of the Constitution of the United States," 28 U.S.C. § 2679(b)(2)(A), in order to "preserv[e] [federal] employee liability for *Bivens* actions." *United States v. Smith*, 499 U.S. 160, 173 (1991). And in 1996, rather than eliminate *Bivens* claims, Congress specifically contemplated and acquiesced to *Bivens* actions "brought with respect to prison conditions," while simultaneously creating an exhaustion requirement for such claims. *See* 42 U.S.C. § 1997e(a); 141 Cong. Rec. H14078-02, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. Lobiondo) (exhaustion requirement would deter frivolous *Bivens* claims while *Bivens* "claims with a greater probability/magnitude of success would, presumably, proceed").

As this Court has recognized, congressional ratification of an implied damages remedy must be respected, even though this Court has come to

disfavor the creation of new private rights of action. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72-73 (1992) (Congress had validated implied remedy under Title IX by "ma[king] no effort to restrict the right of action recognized in *Cannon* [*v. University of Chicago*, 441 U.S. 677 (1979)]"); *see also id.* at 78 (Scalia, J., concurring).

Petitioners go to great lengths to impugn *Bivens*. But while the Court has guarded against exotic new rights of action (*e.g.*, *Wilkie v. Robbins*, 551 U.S. 537 (2007)), it has preserved *Bivens*' core. Part of this core, one explicitly recognized and ratified by Congress, is constitutional actions against federal officials concerning prison conditions. *Carlson*, 446 U.S. at 23; 28 U.S.C. § 2679(b)(2)(a). That is precisely the type of *Bivens* remedy the court of appeals applied here, one for "federal detainee Plaintiffs, housed in a federal facility, [who] allege that individual federal officers subjected them to punitive conditions." App.24a. Just as surely as improper extension of *Bivens* would present separation of powers concerns, so too would the improper *limitation* of congressionally-ratified *Bivens* actions.

### 2. Claims Of Abuse In Federal Custody Are Core, Long-Recognized *Bivens* Claims.

This Court has counseled caution before creating new claims that are "fundamentally different from anything recognized in *Bivens* or subsequent cases." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). But before making a common-law

determination of whether a new remedy is necessary, the first question is whether courts are truly being asked to "authoriz[e] a new kind of federal litigation." *Wilkie*, 551 U.S at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)). Here, they are not.

This Court's precedents suggest that the context of a proposed *Bivens* claim is new in three circumstances, none of which is present here. First, there is an extension of *Bivens* if it is applied to a new constitutional right. *See, e.g.*, *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (noting that Court has "several times assumed without deciding that *Bivens* extends to First Amendment claims").

Second, an extension of *Bivens* is required for a new "category of defendant." *See FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (federal agency); *Malesko*, 534 U.S. at 66 (private entity); *Minneci v. Pollard*, 565 U.S. 118, 119 (2012) (private prison employee). But one "category of defendants" has always been at the *Bivens* heartland: federal officials. That category, as this Court has applied it, includes not just low-level law enforcement officers and prison guards (*Bivens*, *Carlson*), but also high-level policymakers, including the Director of the Bureau of Prisons (*Carlson*) and members of Congress (*Davis*).

Third, even if a *Bivens* cause of action has previously been recognized under a given constitutional provision and against the same category of defendant, an extension of *Bivens* is required if the context in which the claim arises creates previously unexplored separation of powers concerns. For example, in *Chappell v. Wallace*, 462 U.S. 296 (1983), and *United States v. Stanley*, 483

U.S. 669 (1987), the Court declined to extend *Bivens* to claims incident to military service, given the "explicit constitutional authorization for *Congress* '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" *Stanley*, 483 U.S. at 681-82 (quoting U.S. Const., art. I, § 8, cl. 14). Likewise, while *Davis v. Passman*, 442 U.S. 228 (1979), established a *Bivens* cause of action under the due process clause, the elaborate administrative scheme at issue in *Schweiker v. Chilicky*, 487 U.S. 412, 429 (1988), posed previously unconsidered separation of powers concerns. *See Meyer*, 510 U.S. at 484 n.9.[4]

Respondents' claims against DOJ Petitioners challenge their mistreatment in federal custody, in violation of the constitutional guarantees of equal protection and substantive due process. Such claims are at the core of *Bivens*, hardly representing "a new kind of federal litigation." *Wilkie*, 551 U.S at 550 (citation omitted).

Respondents challenge the imposition of highly restrictive conditions of confinement on the basis of religion and ethnicity. This Court has "allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment." *Iqbal*, 556 U.S. at 675. While Respondents have made different (and significantly more detailed) factual allegations than

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[4] The Second Circuit's discussion of the "mechanism of injury" is best understood as reflecting these categories of cases in which a recognized right was asserted, but against a new category of defendants or in a new circumstance presenting distinct separation of powers concerns.

the plaintiffs in *Iqbal*, *infra* pp. 52-54, the factual background is indistinguishable: non-citizens suing federal officials, including high-ranking ones, for discriminatory placement in restrictive conditions in the aftermath of 9/11. *Iqbal*, 556 U.S at 666, 668-69. The Court in *Iqbal*, after expressing skepticism about a separate "First Amendment claim," "assume[d], without deciding" that it could be "actionable under *Bivens*." *Id.* at 675. But the Court saw no need to assume anything regarding the plaintiffs equal protection claim, strongly suggesting that no extension of *Bivens* to a new context was required for that claim.

Respondents also challenge the arbitrary and punitive conditions of confinement they suffered, in violation of their rights to substantive due process. Claims that a federal prisoner has been abused have long been recognized as proper under *Bivens*. *Carlson*, 446 U.S. 14 (recognizing *Bivens* action where prison officials were deliberately indifferent to serious medical need); *see also Cleavinger v. Saxner*, 474 U.S. 193 (1985); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Malesko*, 534 U.S. at 72 ("If a federal prisoner in a BOP facility alleges a constitutional deprivation, he may bring a *Bivens* claim against the offending individual officer"). While the Eighth Amendment applies only to individuals who have been convicted of a crime, other detainees have the same (if not greater) rights to be free from abuse as a matter of substantive due process. *See Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979); *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015). Thus, as Justice Scalia noted, *Bivens* actions are "available to federal pretrial detainees challenging the conditions

of their confinement," claims that would necessarily be based on due process. *Sell v. United States*, 539 U.S. 166, 193 (2003) (Scalia, J, dissenting).[5]

Petitioners claim that this Court has never specifically endorsed a substantive due process or equal protection claim challenging conditions of confinement. Ashcroft Br. 21.[6] As an initial matter, they ignore *Iqbal*, which saw nothing controversial about an equal protection conditions-of-confinement claim. In any event, Petitioners do not explain why the inquiry must be so circumscribed. This Court has already approved of *Bivens* claims for prison abuse, including against high-level officials. It has recognized claims under the Due Process Clause. A conditions of confinement suit arising under the Due Process Clause is not at some exotic frontier of *Bivens* litigation.

Petitioners further argue that Respondents seek an extension of *Bivens* by "challeng[ing] high-level

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[5] Circuit courts have routinely recognized substantive due process challenges to conditions of confinement under *Bivens*. *See Thomas v. Ashcroft*, 470 F.3d 491, 496-97 (2d Cir. 2006); *Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), *abrogated on other grounds by Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) (en banc); *Bistrian v. Levi*, 696 F.3d 352, 372-75 (3d Cir. 2012); *Magluta v. Samples*, 375 F.3d 1269, 1277 (11th Cir. 2004); *Wilkins v. May*, 872 F.2d 190, 195 (7th Cir. 1989); *Lyons v. U.S. Marshalls*, 840 F.2d 202, 203-04 (3d Cir. 1988).

[6] We use the following abbreviations: Brief for Petitioners filed by Ashcroft and Mueller, No. 15-1539 ("Ashcroft Br."); Brief of Petitioner James W. Ziglar, No. 15-1358 ("Ziglar Br."); Brief for Petitioners Dennis Hasty and James Sherman, No. 15-1363 ("Hasty Br."); Brief of Former U.S. Attorneys General as Amicus Curiae in Support of Petitioners, ("Barr Br.").

policy decisions . . . in a context that implicates both national security and immigration." Ashcroft Br. 22. Those are just contestable factual circumstances surrounding the case (as unilaterally characterized by Petitioners), not harbingers of "a new kind of federal litigation." *Wilkie*, 551 U.S at 550 (citation omitted). No case supports Petitioners' notion that case-to-case factual variations require an "extension" of *Bivens* with the full analysis that entails and this Court's approach in *Iqbal* refutes it. But even on its own terms, Petitioners' invocation of (a) their high-level positions, (b) the alleged immigration implications, and (c) the alleged national security implications, do not establish that this case presents an extension of *Bivens*.

a. *High-Level Officials.* Petitioners' status as policymakers does not change the context of Respondents' claims. *See* Ashcroft Br. 22. *Carlson* involved a policymaker defendant—the Director of the Federal Bureau of Prisons—but he did not "enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against [him] might be inappropriate." 446 U.S. at 19 (citing *Davis*, 442 U.S. at 246). The Court concluded that qualified immunity would mitigate the concern that claims might "inhibit their efforts to perform their official duties." *Id.* Similarly, in *Iqbal*, the plaintiff sued the former Attorney General and FBI director for the same policies at issue in this case, and the Court never intimated that these officials' position required an extension of *Bivens*. 556 U.S. at 675; *see also, e.g.*, *Trulock v. Freeh*, 275 F.3d 391, 404-06 (4th Cir. 2001) (*Bivens* action against FBI Director), *cert. denied*, 537 U.S. 1045

(2002). Indeed, if status as a high-level official required an "extension" of *Bivens*, the Court likely would have mentioned it when it rejected the Attorney General's claim to absolute immunity for his national security decisions, and specifically discussed the importance of a *Bivens* remedy for constitutional violations in that context. *Mitchell v. Forsyth*, 472 U.S. 511, 520-24, 523 n.7 (1985).

b. *Immigration.* Petitioners rely (Ashcroft Br. 22 n.7) on circuit court decisions holding that claims challenging immigration enforcement actions require an extension of *Bivens*. *See Mirmehdi v. United States*, 689 F.3d 975, 981 (9th Cir. 2012) (challenge to immigration detention); *see also De La Paz v. Coy*, 786 F.3d 367, 375 (5th Cir. 2015) (challenge to immigration arrest). But they disregard the fact that *Bivens* claims alleging *abuse* while in immigration custody are routinely heard. *See, e.g., Papa v. United States*, 281 F.3d 1004, 1009-11 (9th Cir. 2002); *Humphries v. Various USINS Fed. Emps.*, 164 F.3d 936 (5th Cir. 1999). While claims concerning the exercise of immigration powers (such as admission and removal) might arguably present a new *Bivens* context, a conditions-of-confinement claim is familiar and does not depend on the reason the individual is in custody.

c. *National Security.* Petitioners' argument that national security policy might transform the familiar issue of conditions of confinement in a federal prison into a "novel context" (Ashcroft Br. 22), is also unsupported. Petitioners rely on circuit court cases involving military detention, *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc); *Lebron v.*

*Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011), and overseas law enforcement operations, *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc). The difference between these contexts and the treatment of prisoners in civilian custody in a federal jail on U.S. soil is stark.

Petitioners would gloss over this difference, insisting that "Respondents were not garden-variety prisoners (or even ordinary pre-trial detainees)," Ashcroft Br. 22, but that is a non-sequitur. Even if Respondents had been charged or suspected of terrorism (they were not), they were confined in a federal detention facility, staffed by federal employees, and protected by federal law like any other detainee. As the court of appeals correctly explained, "[t]he reasons why plaintiffs were held at the MDC as if they were suspected of terrorism do not present the 'context' of their confinement." App.23a. Even more fundamentally, the complaint alleges that Petitioners *knew* there was no cause to treat Respondents as if they implicated national security. Officials cannot transform the nature of this case by their unilateral recharacterization of it.

### 3. Even If These Claims Presented A New "Context," A Remedy Should Be Available.

Even if this Court considered Respondents' claims to arise in a new *Bivens* context,it does not follow that they should fail. Rather, the Court follows a "familiar sequence" to determine whether to

recognize the cause of action. *Wilkie*, 551 U.S at 550. First, the Court asks whether any existing alternative remedy presents a convincing reason for the judiciary to stay its hand. *Id.* Second, "even in the absence of an alternative," the Court "must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation." *Id.* (quoting *Bush*, 462 U.S. at 378). At this step, the Court "weigh[s] reasons for and against the creation of a new cause of action, the way common law judges have always done." *Id.* at 554.

Together, this inquiry assists the Court in determining how best to vindicate important constitutional interests in deterrence and compensation, while minimizing separation of powers concerns. *See* Anya Bernstein, *Congressional Will and the Role of the Executive in Bivens Actions: What is Special about Special Factors*, 45 Ind. L. Rev. 719 (2012). Where an alternative remedy is available, *see Minneci*, 565 U.S. at 127-30; *Schweiker*, 487 U.S. at 429, or where an implied damages remedy would intrude in an area uniquely committed to a coordinate branch or require difficult line-drawing, *see Chappell*, 462 U.S. at 301, separation of powers concerns are heightened. At the same time, an important part of the balance is effectuating the "core purpose" of *Bivens*: "deterring individual officers from engaging in unconstitutional wrongdoing." *Malesko*, 534 U.S. at 74.

### a) Alternative Remedies

This Court has indicated that an elaborate administrative scheme that provides "meaningful remedies" counsels against a *Bivens* remedy, because Congress is well positioned to weigh the costs and benefits of supplementing an existing scheme. *Bush*, 462 U.S. at 368, 388-90; *Schweiker*, 487 U.S. at 425. An implied damages remedy may also be unnecessary if there is an alternative, such as state tort law, providing "roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." *Minneci*, 565 U.S. at 130.

Petitioners do not identify any administrative scheme which could even theoretically have provided Respondents with meaningful remedies, and Respondents have no access to state torts because they would be foreclosed by the Westfall Act. *See id.* at 126 ("existence of an adequate 'alternative, existing process' differs dramatically" depending on employment status of the defendant, because "[p]risoners ordinarily *cannot* bring state-law tort actions against employees of the Federal Government"). It is thus clear that there is no alternative remedy that should cause the judiciary to refrain from recognizing a *Bivens* remedy here.

To the contrary, the *absence* of any opportunity for independent review counsels strongly in favor of finding a *Bivens* remedy here, suggesting that this is a particularly "meritorious case for recognizing a new constitutional cause of action." *Wilkie*, 551 U.S.

at 554; *Malesko*, 534 U.S. at 72-73. While federal prisoners usually have "access to remedial mechanisms established by the BOP, including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program," *Malesko*, 534 U.S. at 74, Respondents allege that an important part of the scheme of abuse they faced was restrictions on filing administrative complaints and contacting the outside world, including attorneys.[7] *See* App.301a (¶140) (information on filing administrative complaints withheld); JA276-78; App.274a-275a (¶61); *see also* JA296-97 (detainees' ability to obtain and consult with attorneys "severely limited"); App.281a (¶79); JA222-23 (initial communications blackout); App.282a-287a (¶¶83-86, 92-97); JA247-55 (restrictions on legal calls); App.282a (¶¶81-82); JA224-30 (counsel given false information about location of detainees); JA389-91 (illegal audio-taping of attorney visits).

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[7] It is indisputable that neither the BOP's administrative remedy program nor the availability of a claim for injunctive relief or *habeas* presents a convincing reason for the judiciary to stay its hand under *Wilkie* step one. *See McCarthy v. Madigan*, 503 U.S. 140, 151 (1992) (BOP's administrative remedy program is not an effective alternative scheme or a *Bivens* special factor), *superseded by statute on other grounds as stated in Booth v. Churner*, 532 U.S. 731, 740 (2001); *Minneci*, 565 U.S. at 130 (asking if potential alternative remedy provides "roughly similar incentives" and "roughly similar compensation"); *Mitchell*, 472 U.S. at 523 n.7 (noting that for victims of a completed constitutional violation by the Attorney General, habeas or injunctive relief is "useless" as compared to damages remedy).

Judge Raggi assumed Respondents could have filed a *habeas* action to challenge the conditions of their confinement. App.116a. That is not settled as a legal matter, *see Aamer v. Obama*, 742 F.3d 1023, 1031-32 (D.C. Cir. 2014) (Supreme Court has "expressly" left "open" whether habeas applies "to conditions of confinement claims"), and Respondents were in any event constrained from pursuing *habeas* by Petitioners' misconduct. Indeed, when a few detainees gained access to counsel and filed habeas petitions to challenge their detention, the INS and FBI worked to clear those individuals ahead of detainees who had not filed legal actions, in order to avoid answering the petitions in federal court. JA198-201. The *only* remedy Respondents had access to were FTCA claims, and those could not address much of the alleged misconduct (like discrimination), and do not deter individuals. *Carlson*, 446 U.S. at 19-23.

Respondents thus "seek a cause of action against an individual officer, otherwise lacking, as in *Carlson*." *Malesko*, 534 U.S. at 74.

**b) Common-Law Balancing**

Under the second step of the analysis, the Court "weigh[s] reasons for and against the creation of a new cause of action." *Wilkie*, 551 U.S. at 554. There are profoundly important reasons to ensure that federal prisoners abused in custody have a remedy, and no special factors counseling hesitation before recognizing one.

"The purpose of *Bivens* is to deter individual federal officers from committing constitutional

violations." *Malesko*, 534 U.S. at 70. In furtherance of that "core" purpose, this Court has extended *Bivens* "to provide an otherwise nonexistent cause of action against *individual officers* alleged to have acted unconstitutionally," and "to provide a cause of action for a plaintiff who lacked *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct." *Id.* at 70. While this Court has declined to further extend *Bivens* in recent years, it has not done so reflexively, but after careful analysis that affirms the vitality of *Bivens*' core functions of deterrence and compensation. *See, e.g.*, *Minneci*, 565 U.S. at 130 (considering whether state tort law remedies provide roughly the same deterrence and compensation as would a *Bivens* claim); *Meyer*, 510 U.S. at 485. Without a *Bivens* remedy available in cases such as this, future law enforcement officials would not be sufficiently deterred from engaging in blatant racial profiling or ordering torture in federal prisons in response to a real or perceived crisis.

The Court, in deciding whether to recognize a *Bivens* remedy, also considers "whether the type of injury sustained by the plaintiff is normally compensable in damages, and whether the courts are qualified to handle the types of questions raised by the plaintiff's claim." *Butz v. Economou*, 438 U.S. 478, 503 (1978); *see also Wilkie*, 551 U.S. at 562 (rejecting *Bivens* claim that would present difficulty in crafting a workable cause of action). There is no question that Respondents' injuries are normally compensable and within a court's core competencies. *See Davis*, 442 U.S. at 245; *Wilkie*, 551 U.S. at 556 (noting judiciary's expertise in "identifying the

presence of an illicit reason (in competition with others)," including regarding "claims of discrimination based on race or other characteristics"). Courts routinely award damages for equal protection and substantive due process violations. And striking the correct balance between deference to officials' efforts to ensure prison security and the constitutional rights of the imprisoned is an area of judicial expertise. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97 (1976) (establishing deliberate indifference standard).

On the other side of the ledger would be any "special factors counselling hesitation." *Wilkie*, 551 U.S at 550 (quoting *Bush*, 462 U.S. at 378). Petitioners' invocation of such special factors is misplaced—and far from sufficient to outweigh the need to deter future discrimination and abuse of the kind alleged here.

i. *"High-Level Policy Decisions."* DOJ Petitioners first argue that *Bivens* actions should be unavailable to challenge "high-level policy decisions" (Ashcroft Br. 23), even if clearly unconstitutional. This extraordinary theory makes no sense and has no support.

Petitioners quote *Malesko*'s observation that *Bivens* is not "a proper vehicle for altering an entity's policy," but they wrest those words from their context. Ashcroft Br. 24 (quoting *Malesko*, 534 U.S. at 74). The issue in *Malesko* was not whether *Bivens* applied to constitutional violations effectuated as a matter of policy, but to claims against a non-public entity. 534 U.S. at 63. Indeed, the Court explicitly stated that *Bivens* is an appropriate way to deter a

federal officer's unconstitutional actions, "*no matter that they . . . are acting pursuant to an entity's policy.*" 534 U.S. at 70 (emphasis added).[8]

The danger of this proposed "special factor" is palpable. If a future Attorney General orders his subordinates to confine all Muslim prisoners to extreme isolation, or deprive all Jewish prisoners of access to kosher food, he would be setting "policy"—but he also would be a federal officer violating clearly established constitutional rights. Petitioners' approach would leave undeterred officials with the power to wreak the most constitutional harm on the greatest number of people. Moreover, a "high-level policy" exception would raise vexing questions about when a clearly unconstitutional law enforcement action crosses the line and becomes a clearly unconstitutional policy, and what separates "high" and "low"-level policy.

If anything, it is *more* vital to our system of government to ensure accountability when it is high-ranking officials who order clearly unconstitutional treatment. *See Butz*, 438 U.S. at 506 ("Extensive Government operations offer opportunities for unconstitutional action on a massive scale."); *United*

[8] Petitioners also rely on two circuit court decisions—including one from the same circuit that rejected their proposed "policy decision" exception to *Bivens*. Ashcroft Br. 24-25 (citing *Arar*, 585 F.3d at 578; *Vance*, 701 F.3d at 205). Though both courts questioned the appropriateness of using *Bivens* to challenge high-level policy, their holdings turned on separation of powers concerns, such as the military chain of command, and the potential need to second-guess the good-faith nature of a foreign country's assurances that a transferred detainee would not be tortured. *Vance*, 701 F.3d at 199-200; *Arar*, 585 F.3d at 578.

*States v. Lee*, 106 U.S. 196, 220 (1882) ("No officer of the law may set that law at defiance with impunity. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."). Yet barring *Bivens* suits for clearly unconstitutional policies would effectively grant high-ranking officials absolute immunity, effectively overturning *Mitchell*, 472 U.S. at 520-24.[9]

Petitioners' only justification for their novel exception to Bivens is that high-level "policies are more likely to be amenable to judicial review under the Administrative Procedure Act," and receive scrutiny from non-judicial sources, like the OIG and Congress. Ashcroft Br. 24. Notably absent is a concession that the temporary policies at issue here *would* have been amenable to APA review as "final agency action," a result Petitioners took care to prevent by avoiding a paper trail. App.265a (¶39); JA97, 175-177.

Neither can Petitioners show that unconstitutional policies will receive sufficient public attention to overcome the lack of accountability before the judiciary. They cite the OIG Report as an example, but that report was motivated by, among

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[9] Petitioners argue that there is no connection between the "special factors" analysis and official immunity. Ashcroft Br. 26 (citing *Stanley*, 483 U.S. at 684-85). While the doctrines are distinct, they certainly overlap, particularly with respect to their focus on deterrence. *See Mitchell*, 472 U.S. at 522-23, 523 n.7. Moreover, this Court has previously recognized the relationship between the decision of whether to recognize a cause of action and to apply immunity, finding that an award of absolute immunity could result in the Court's approval of a cause of action being "drained of meaning," *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978) (citation omitted).

other things, *this lawsuit* (JA46 n.4). And the OIG's supplemental investigation into physical and verbal abuse at MDC was initiated after several detainees reported discrete instances of physical abuse. JA346-347. The OIG's mission is to investigate allegations of waste, fraud, and abuse in DOJ programs and personnel; there is no evidence it favors investigation into unlawful policy over investigation into individual illegal acts. Moreover, even if Respondents had access to an APA claim, or could expect attention from Congress or the OIG, this Court has never treated such uncertain possibilities as substitutes for *Bivens* liability, without a showing that they would provide adequate deterrence and compensation. *See Minneci*, 565 U.S. at 127-30; *cf. Mitchell*, 472 U.S. at 523 n.7.

The legitimate public interest in protecting government officials acting in good faith in a time of crisis is fully protected by qualified immunity, whatever the official's rank. If clearly unconstitutional acts of a single prison guard against a single prisoner are redressable in court, it cannot be the case that a clearly unconstitutional policy, one that affects hundreds or thousands of people, is not.

ii. *Immigration.* Petitioners next argue that the high-level policy in this case "implicate[s] both national security and immigration," into which the courts should be reluctant to intrude. Ashcroft Br. 18. But the political branches' plenary power over the exclusion and removal of non-citizens is not *carte blanche* to arbitrarily punish or mistreat detainees in federal custody pending removal.

It is well-established that non-citizens present in this country, even those who have violated immigration law, are protected by the Constitution's guarantees of equal protection and due process. *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *Wong Wing v. United States*, 163 U.S. 228 (1896). "These provisions are universal in their application to all persons within the territorial jurisdiction . . . and the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

Because non-citizens, like citizens, have a constitutional right to be free from mistreatment in government custody, the Court must determine whether there is a reason to deprive them of a remedy it has provided to citizens in the same setting. Petitioners invoke the plenary power over immigration, but Respondents do not challenge their detention or removal, only their conditions of confinement. The Court need not grapple with the question of implying a damages remedy for constitutional violations concerning the Executive's immigration powers or with the relevance of the INA, *cf. Mirmehdi*, 689 F.3d at 982; *De La Paz*, 786 F.3d 367, as the INA does not regulate detention conditions much less provide a remedy for them. Petitioners cannot explain how plenary power or the INA's "intricate remedial scheme" has any bearing on the claims in this case.

Petitioners make the conclusory assertion that because the challenged conditions of confinement "applied only to aliens . . . detained for apparent

violations of U.S. immigration laws," "[t]he principles undergirding courts' reluctance to infer *Bivens* remedies in other immigration-related cases apply with full force." Ashcroft Br. 30. That simply does not follow. Immigration law may have been the original reason for Respondents' detention (even though Petitioners ordered their removal delayed). App.269-270a (¶¶53-55). But immigration law had nothing to do with the harsh conditions of confinement Respondents suffered at a Bureau of Prisons facility. It is long-established that non-citizens can be excluded or expelled, and detained "as part of the means necessary to give effect" to their removal, but just like citizens, they have the right to be free from punishment without due process of law. *Wong Wing*, 163 U.S. at 235; *see also Zadvydas*, 533 U.S. at 721 (Kennedy, J., dissenting) ("Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish.").

Given the robust role of the judiciary in reviewing constitutional violations against non-citizens outside the context of entry and exit, and given that citizens have a remedy for comparable rights violations, there is no reason to deny that remedy to non-citizens. Indeed, if any law enforcement practice against out-of-status non-citizens is inappropriate for damages because it "implicates immigration," there is nothing to deter rogue officers from engaging in routine unconstitutional treatment of non-citizens. Foreign relations interests run the other way; the "[p]erceived mistreatment of aliens in the United States may lead to harmful reciprocal treatment of

American citizens abroad." *Arizona v. United States*, 132 S. Ct. 2492, 2498 (2012); *see also Vance*, 701 F.3d at 203 ("It would be offensive to our allies, and it should be offensive to our own principles of equal treatment, to declare that this nation systematically favors U.S. citizens over Canadians, British, Iraqis, and our other allies when redressing injuries . . . .").

iii. *National Security.* Nor does the fact that Respondents were non-citizens arrested in connection to a terrorism investigation counsel hesitation in recognizing a *Bivens* remedy. Petitioners' argument to the contrary expands this Court's "special factors" analysis beyond its breaking point, and ignores Respondents' well-pleaded allegations. Their position is less an argument rooted in *Bivens* jurisprudence, and more an appeal to disregard the complaint and assume Petitioners should win on the merits.

Petitioners suggest that incantation of the magic phrase "national security" triggers complete judicial deference. But they disregard this Court's warning that "the label of 'national security' may cover a multitude of sins." *Mitchell*, 472 U.S. at 523. Indeed, "[g]iven the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent." *Id.* (citation omitted). The need for *Bivens* remedies in this context is more powerful, not less.

In support of their plea for extreme deference, Petitioners cite two decisions of this Court that are inapposite. In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Court held that the President, as Commander-in-Chief, has authority "to classify and

control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch." *Id.* at 527. The Court reasoned that security clearance "may be based upon concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States," and a "predictive judgment" of this sort "must be made by those with the necessary expertise in protecting classified information." *Id.* at 528-29. Similarly, in *Haig v. Agee*, 453 U.S. 280 (1981), the Court endorsed the Executive's power to revoke the passport of an American citizen conceded to be causing or likely to cause "serious damage to the national security or foreign policy of the United States." *Id.* at 287. Neither case suggests that the Executive should have the unreviewable authority to respond to a crisis by singling out a discrete group, on grounds of race or religion, for harsh treatment. There is a different case supporting that proposition—but Petitioners tellingly fail to cite it. *See Korematsu v. United States*, 323 U.S. 214, 219 (1944) ("we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal"); *infra* pp. 71-72.

When this Court has addressed national security in the *Bivens* context, it has limited itself to the discrete sphere of the military, and based its decision on the explicit constitutional commitment of military affairs to non-judicial regulation. *Chappell*, 462 U.S. at 300-304; *Stanley*, 483 U.S. at 681 (disallowing "*Bivens* actions whenever the injury arises out of activity 'incident to service,'" but expressly reserving

the possibility of *Bivens* claims by servicemembers against military officials not incident to service). Separation of powers concerns counsel significant hesitation before interfering with the military chain-of-command; it does not compel judicial abstention when immigration violators who share a particular ethnicity or religion are mistreated in a federal prison.

Petitioners cite several circuit decisions expanding upon *Chappell* and *Stanley* to bar *Bivens* claims arising from military detention. Ashcroft Br. 24-27. Regardless of whether these cases are correctly decided, they rest on the special concerns of military detention, and thus involve no analysis of whether national security concerns might counsel against recognizing a *Bivens* remedy for abuse in a federal prison. *See Lebron*, 670 F.3d at 550 ("Padilla's enemy combatant classification and military detention raise fundamental questions incident to the conduct of armed conflict . . . ."); *Vance*, 701 F.3d at 199-200 (judicial inquiry into abuse in military detention, in an active zone of combat, risks interference with the military chain of command); *see also Doe v. Rumsfeld*, 683 F.3d 390, 395 (D.C. Cir. 2012) (identifying separation of powers concerns raised in "military detainee cases").

In contrast, Respondents challenge abuse in civil detention, under the authority of the Department of Justice, where conditions are normally subject to judicial review. *See Carlson*, 446 U.S. at 19. Petitioners imply that Respondents' treatment, like the treatment of military detainees, is nevertheless outside the expertise of the federal courts because

evaluating the legality of subjecting "*certain detainees*" arrested "during the September 11 investigation to restrictive conditions" requires considering the entire history of al Qaeda in America. Ashcroft Br. 27-28 (emphasis added). Given that Respondents were "connected to the 9/11 investigation" not based on any potential evidentiary link or individualized security analysis, but rather due to their race, religion, ethnicity and immigration status, we have no such concerns about the Court's competence. *See infra* pp. 52-54.

Petitioners' basic response is to disagree with the allegations in the complaint and insist that they were merely "err[ing] on the side of caution so that a terrorist would not be released by mistake." Ashcroft Br. 29 (quoting JA128). As an initial matter, this case is not about the lawfulness of Respondents' continued detention. The "cautious" decision Petitioners allegedly made was to confine immigration detainees, who could have been detained in different conditions (or removed from the country), in the harshest conditions available. Petitioners are alleged to have made this decision despite *knowing* that there was no basis, apart from illegitimate racial and religious stereotypes, of suspecting them of terrorism. Petitioners, of course, say they did not know this. Ashcroft Br. 29. If Petitioners' knowledge is not adequately pleaded, they could prevail on that ground. *But see infra* Section I.B. Likewise, if they are right that blatantly discriminatory treatment of Arabs and Muslims was reasonable in the aftermath of 9/11, they could prevail on qualified immunity grounds. *But see infra* Section I.C. But if they are wrong, and if

Respondents have alleged clearly unconstitutional treatment knowingly directed by Petitioners, any force their "national security" argument might otherwise have must evaporate.

Essentially, Petitioners argue that judicial review of an individual who is treated *as if* he raises national security concerns, will itself raise national security concerns, no matter that neither evidence nor reason supports the treatment. This circular logic threatens the rule of law. What follows is that every human being in the country, and especially every Muslim non-citizen, can be treated as a terrorist until they prove the negative, without the opportunity for judicial review. This backwards view of the Constitution cannot immunize from liability clear constitutional violators.

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It is important to remember that recognition of a *Bivens* cause of action does not guarantee a plaintiff victory, or even success on a motion to dismiss or for summary judgment. The import of Petitioners' argument is that no remedy is available *even if* their conduct was so clearly unconstitutional that they should have known it was impermissible at the time. The message of such a ruling would be clear: high-ranking law enforcement officials may deliberately decide to violate the Constitution without fear of accountability.

This Court should not send such an extraordinary message. Federal detainees, abused on U.S. soil by a civilian law enforcement agency in clear violation of the Constitution, must have their day in court.

### B. Respondents' Detailed Factual Allegations State Plausible Claims.

DOJ Petitioners argue that Respondents have failed to plead plausible constitutional claims. Their arguments are based on a misreading of this Court's precedent and a failure to engage with the complaint's actual allegations.

It is a fundamental tenet of American jurisprudence that the federal courthouse doors should be easy to enter, with just a "short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2); *see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (requirement of factual detail would be "impossible to square . . . with the liberal system of 'notice pleading'"); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 513-14 (2002) (discovery and summary judgment, not heightened pleading requirements, are the proper means to adjudicate merit).

Notice pleading remains the rule, but under *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Iqbal*, 556 U.S. at 678-79, courts now follow two steps. First, while factual allegations are taken as true, mere conclusory statements that mirror the elements of a cause of action are not. *See Twombly*, 550 U.S. at 555. Second, with the factual allegations treated as true, courts consider whether the claim to relief has "facial plausibility." *Iqbal*, 556 U.S. at 679.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. This does

not mean that a plaintiff must show that her claims are *more* plausible than any other possible explanation for the facts alleged. *See id* ("The plausibility standard is not akin to a 'probability requirement.'" (quoting *Twombly*, 550 U.S. at 556)); *see also Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314, 324 (2007) (holding that, even under the heightened pleading requirement of the Private Securities Litigation Reform Act, an inference of scienter need not be "the *most* plausible of competing inferences" (emphasis added; citations omitted)).[10] Even if the claim seems "improbable" and ultimate recovery "remote and unlikely," it still survives a motion to dismiss. *Twombly*, 550 U.S. at 556.

Key to understanding how *Twombly* and *Iqbal* permit complaints to survive when there are multiple "plausible" accounts (some lawful and some unlawful) is the role of inferences. Inferences are rarely conclusive. *Twombly* and *Iqbal* do not require a complaint to provide conclusive inferences to be plausible. There is always some alternative explanation; that is why cases are brought to the courts, for a decision among alternatives.

Petitioners would upend these longstanding principles. They imagine that this Court, in *Iqbal*, "refused to credit" assertions of discriminatory

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[10] Lower courts have adhered to this rule. *See, e.g., Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) ("A complaint survives a motion to dismiss even if there are two alternative explanations, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible." (citation and alterations omitted)).

motive because the Court viewed the plaintiff's "*assertions* [as] implausible in light of 'more likely explanations.'" Ashcroft Br. 41-42 (emphasis added; citation omitted). But *Iqbal* refused to credit those assertions because they were conclusory—not because alternative explanations were more probable. 556 U.S. at 681. What must be "plausible" is the plaintiff's *claim for relief*, not her factual allegations, of which courts must "assume the[] veracity." *Id.* at 678-79; *see also Twombly*, 550 U.S. at 555 (plausibility of the claim is judged "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"). Thus, a factual allegation or reasonable inference must be accepted as true, even if an alternative explanation appears more likely. [11]

Petitioners' erroneous application of *Iqbal* stems from their conflation of the first step of the inquiry—determining whether allegations are factual or conclusory—with the second inquiry, which is whether a legal claim to relief is plausible given the factual allegations and appropriate inferences. Where Mr. Iqbal relied on conclusory assertions, Respondents have supplied detailed factual allegations. These must be taken as true, and when

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[11] Petitioners repeatedly contradict this principle, for example, claiming that Mr. Iqbal had no "*plausible* allegation" linking petitioners to his placement in the ADMAX SHU based on race, religion or national origin. Ashcroft Br. 41 (citing *Iqbal*, 556 U.S. at 682-83) (emphasis added). What was missing in *Iqbal* was a *factual* allegation, not a *plausible* allegation. 556 U.S. at 682-83. *Amici* follow suit, with the jarring assertion that Rule 8 requires sufficient facts to "infer that the allegations of the complaint are true." Barr Br. 27.

they are, Respondents have stated a plausible claim to relief.

### 1. Respondents Adequately Allege Constitutional Violations From The Outset Of DOJ Petitioners' Policy.

DOJ Petitioners violated two constitutional rights: (1) equal protection, by intentionally discriminating against Respondents on the basis of race, religion, and ethnicity, and (2) substantive due process, by imposing on Respondents harsh and punitive conditions of confinement.

a. *Equal Protection.* Respondents allege that nearly 500 Muslim, Arab, and South Asian detainees were arrested in the New York area and held in connection to the terrorism investigation, even though all were eventually cleared of any connection to 9/11. App.252a-253a, 261a-262a (¶¶2, 29, 31). These allegations, the latter of which was absent from the complaint in *Iqbal*, on their own suggest an equal protection violation, as a "clear pattern, unexplainable on grounds other than race." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Yick Wo*, 118 U.S. at 374. But Respondents have alleged much more.

Ashcroft created and implemented a policy of rounding up and detaining Arab and South Asian Muslims to question them about terrorism, while deliberately avoiding a paper trail. App.265a (¶39). Ashcroft told Mueller to direct the FBI to question any male between 18 and 40 from a Middle Eastern country and to tell INS to round up every

immigration violator who fit that profile, even though he was aware this would result in the arrest of many individuals who had no connection to terrorism. App.265a (¶41). Mueller complied, directing all tips investigated, even those based solely on religion, ethnicity, national origin or race, contrary to prior law enforcement practice. App.265a (¶40). They received detailed daily reports of the detentions, and were aware that the FBI had no information connecting Respondents to terrorism prior to identifying them as "of interest" to the 9/11 investigation. App.267a-268a (¶47). These non-conclusory allegations must be taken as true. Taken as true, they plausibly suggest discrimination.[12]

Additional factual allegations amplify the inference of discriminatory intent. For example, Ashcroft made public statements criticizing Islam as compared to Christianity. App.272a-273a (¶60.d.). Petitioners used racial, religious and national origin profiling in other enforcement contexts in the aftermath of 9/11. App.273a-274a (¶60.f.). And notably, Petitioners' hold-until-cleared policy for minor immigration violators was contrary to law and historical practice. App.269a (¶51).

This policy of discrimination led, predictably, to discriminatory acts. Mueller admitted that there was no guidance or policy to determine whether a detainee was of interest, App.267a (¶45), leaving agents to follow Petitioners' direction to focus only on

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[12] *Amici* state the "OIG Report concluded that the DOJ Petitioners did not direct anyone to engage in the mass incarceration of aliens from the Middle East . . . ." Barr Br. 20. Tellingly, there is no citation for this assertion.

individuals who were Arab, South Asian, or Muslim. As a result, the FBI's New York field office considered an individual's Arab appearance and Muslim beliefs as relevant factors in conducting the post-9/11 investigation. App.266a (¶42). Such detainees were consistently treated differently than similarly situated detainees. App.266a-267a (¶43) (detailing examples of differential treatment of detainees who did not fit profile).[13]

According to DOJ Petitioners, these allegations are "functionally identical" (Ashcroft Br. 41; Ziglar Br. 28-29) to the two factual allegations identified in *Iqbal*, *i.e.*, that (1) Mueller directed the arrest of thousands of Arab Muslim men, and (2) Ashcroft and Mueller approved the policy of holding post-9/11 detainees in highly restrictive conditions. *Iqbal*, 556 U.S. at 681. Not so. Decisive in *Iqbal* was the absence of factual allegations linking DOJ Petitioners to the decision to subject Muslim and Arab detainees *without suspected ties to terrorism* to restrictive conditions. 556 U.S. at 682-83. Without this fact, Mr. Iqbal's allegations were "consistent with" unlawful discrimination, but they could not "nudge[]" the claim to plausibility, at least absent additional allegations showing Petitioners' discriminatory intent. *Id.* at 681, 683.

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[13] Respondents' experiences confirm the role of race and ethnicity in the investigation. *See* App.302a, 306a (¶¶143, 158) (Abbasi and Mehmoud arrested based on tip about "male, possibly Arab"); App.318a (¶195) (Khalifa arrested based on tip about several Arabs who were renting a post-office box); App.328a (¶230) (Bajracharya arrested based on tip about "Arab male" videotaping outside a building that contained, among many other offices, the DA's office and an FBI office).

Mr. Iqbal tried to allege discriminatory intent, but the Court disregarded as conclusory his allegations that Petitioners had subjected him to harsh conditions of confinement as a matter of policy "because of" his race, religion and national origin. *Iqbal*, 556 U.S. at 680-81. The Court did so not because this allegation was "unrealistic or nonsensical," but because it amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 681 (quoting *Twombly*, 550 U.S. at 555).

It was only after concluding that Mr. Iqbal's factual allegations were merely *consistent* with discrimination that the Court then turned to the alternative lawful explanations that might explain the set of events detailed in Mr. Iqbal's complaint. *Id.* at 682. The Court emphasized that it was considering this alternative in light of Mr. Iqbal's specific failure to adequately allege discriminatory intent. *Id.* ("*On the facts respondent alleges* the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." (emphasis added)).

Respondents amended their complaint in light of the Court's decision in *Iqbal*. Based on years of discovery, they were able to allege what was missing in *Iqbal*: a policy by DOJ Petitioners to target Muslims and Arabs regardless of whether there was a legitimate reason to suspect them of ties to terrorism, and an instruction to isolate such individuals and subject them to harsh restrictions.

App.265a, 267a-268a, 274a-276a (¶¶39-41, 44-47, 61-62, 67).[14] These allegations raise the inference of discrimination, thus there is no opportunity to consider alternative nondiscriminatory explanations. To do so would be to weigh the likelihood that Respondents' allegations are true against the likelihood that they are false. It would impose the probability requirement this Court squarely rejected in *Iqbal*.

DOJ Petitioners could not, and so do not, argue that Respondents' detailed allegations are conclusory. Instead they simply pretend they do not exist (for example, never addressing paragraphs 39, 40, 46, 48, 61, and 62 of the complaint). Because Respondents' non-conclusory allegations establish what was missing in *Iqbal*—discriminatory intent—the equal protection claim must survive.

b. *Substantive Due Process.* Respondents also allege substantive due process violations, an independent claim not addressed in *Iqbal* that survives even if a discriminatory motive has not been adequately pled.

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[14] Moreover, unlike Mr. Iqbal, Respondents do not allege that they were placed in restrictive confinement based on a law enforcement officer's determination that they were of "high interest" to the terrorism investigation. *Iqbal*, 556 U.S. at 682-83. No such determination was made for many detainees held in the ADMAX SHU. App.252a-254a (¶¶1, 4). Ziglar misses the distinction. He points to Mr. Iqbal's allegation that "government officials" subjected him to restrictive confinement though he lacked a connection to terrorism, without acknowledging that this fails to link Petitioners to the decision, a failing that does not exist in Respondents' complaint. Ziglar Br. 28.

Respondents were held between three and eight months in conditions designed for the most dangerous convicted criminals in the federal prison system—even though there was no reason to suspect Respondents of anything beyond immigration violations. When a "restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish*, 441 U.S. at 539. Arbitrary placement of a civil detainee in prolonged isolation states a due process violation. *See id.* at 539 n. 20.[15]

Respondents' factual allegations support the reasonable inference that DOJ Petitioners caused Respondents to be placed in isolation. Ashcroft and his small working group instructed that Respondents be restricted from contacting the outside world, App.274a-275a (¶61), and such restriction could only be accomplished by placement in a Special Housing Unit. The OIG Report confirms this fact. *See* JA72 (BOP Director reporting that "the Department [of Justice] wanted the BOP to limit, as much as possible within their lawful discretion, the detainees' ability to communicate with other inmates and with people outside the MDC"). It also confirms that the Attorney General's office was in direct communication with the BOP about how the BOP

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[15] *See also Iqbal v. Hasty*, 490 F.3d 143, 168-69 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 662 (2009); *Stevenson v. Carroll*, 495 F.3d 62, 68-69 (3d Cir. 2007); *Magluta*, 375 F.3d at 1274-76; *Brown-El v. Delo*, 969 F.2d 644, 648 (8th Cir. 1992).

could isolate detainees. JA221-22. Because Respondents sufficiently allege that Petitioners intended to restrict communications, and because government officials routinely accomplish such restrictions through placement in isolation, it is reasonable to infer that Petitioners intended for Respondents to be placed in restricted housing.

Respondents' allegations further support the conclusion that DOJ Petitioners intended for Respondents to be treated harshly. Petitioners "mapped out ways to exert maximum pressure" on the detainees. App.274a-275a (¶61). They "decided to spread the word among law enforcement personnel that the 9/11 detainees were *suspected terrorists, or people who knew who the terrorists were,* and that they needed to be encouraged in any way possible to cooperate." *Id.* (emphasis added).

This description of Respondents was false, and Petitioners knew it to be false. DOJ Petitioners knew that their profiling policy "would result in the arrest of many individuals about whom they had no information to connect to terrorism." App.265a (¶41). More specifically, they were aware that the FBI had no information connecting Respondents to terrorism prior to identifying them as "of interest" to the 9/11 investigation. App.267a-268a (¶47). By misrepresenting Respondents' status to subordinates, and calling them "suspected terrorists," Petitioners ensured that Respondents would be detained in the harshest conditions that exist in the federal system.

It is plausible to conclude that Petitioners anticipated and intended this natural result of their

actions. Indeed, because Petitioners intended for the conditions to be an aid for interrogation, App.275a (¶65), it is more than merely speculative that they were intended to be isolating and harsh. Even if other inferences could be drawn, plausibility is all that *Iqbal* requires for pleading intent. *See, e.g.*, *Twombly*, 550 U.S. at 556.

Thus, the complaint's detailed factual allegations and the reasonable inferences they support, taken as true, state plausible claims of equal protection and substantive due process violations, which began when Petitioners crafted their policy of holding Muslim men of Arab or South Asian descent in highly restrictive conditions. Although the court of appeals focused on later events as giving rise to the constitutional violations, this Court may affirm on any ground, including one rejected by the court below. *See, e.g.*, *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989). In concluding that Respondents' original theory was insufficient, the Second Circuit made two mistakes.

First, the court focused on the fact that DOJ Petitioners did not create the particular conditions in question. App.31a. But Petitioners can be liable for ordering detainees to be held in isolation and subjected to restrictive conditions for arbitrary or discriminatory reasons, even if they did not design the details of the mistreatment. *See supra* pp. 54-57.

Second, the court thought that Respondents had failed to plead that Ashcroft's initial policy required restrictive conditions for detainees in the absence of individualized suspicion of terrorism. App.31a. *But see* App.265a-267a, 274a-275a (¶¶39-41, 43-46, 61).

The court seems to have based this conclusion on a September 22 order by INS official Michael Pearson, which instructed INS agents to limit arrests to aliens in whom the FBI had an "interest." App.17a. Yet earlier orders by the same official make clear that INS was arresting individuals without knowing the basis of the FBI's "interest," JA109, and even Pearson's updated order did not bind the FBI to make its "interest" determinations on legitimate grounds, JA107-108. The September 22 order was issued precisely because "many of the people arrested . . . might not have a nexus to terrorism," JA109-10, reflecting an awareness that arrests were being made on the basis of religion, race and ethnicity. App.266a-267a (¶42-44).[16]

Third, the court relied on the fact that the New York field office operated differently from other areas, App.17a, but there is no indication it acted in violation of orders from headquarters. Instead, the allegations establish both that New York was the focal point of the investigation and that FBI headquarters directed all of the field offices, including New York's, with Mueller in daily contact with the field offices. App.270a-271a (¶¶56-57); JA64, 75, 112-13, 118-20). Even at this early period, before merger of the New York list described below, "it soon became clear that many of the September 11 detainees had no immediate apparent nexus to terrorism." JA113. The Justice Department and FBI ordered the detainees to be treated as "of interest" regardless. JA114. For example, on

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[16] Indeed, Benatta and 84 other detainees were arrested before the relevant orders. App.311a (¶174); JA76.

October 2, 2001, FBI headquarters sent an electronic communication to the New York Field Office asking if the FBI had an investigative interest in Abbasi, Benatta, and other detainees, *and asking it to describe the basis for the initial interest.* App.304a, 315a (¶¶149, 186) (emphasis added). Despite the New York Field office's failure to respond with any articulation of any investigative interest, FBI headquarters treated them as "of interest." App.304a-305a, 315a-316a (¶¶149-151, 187-89).

Thus, the OIG evidence relied upon by the court of appeals corroborates, rather than conflicts with, Respondents' allegations of an initial and purposeful policy to target Muslims and Arabs for mistreatment, without regard to evidence of ties to terrorism.

### 2. At A Minimum, Respondents State A Claim Based On The Merger Of The New York List.

Even though it incorrectly rejected the above theory, the Second Circuit properly found that Respondents had stated plausible claims for relief based on events relating to Petitioners' decision to merge a list of New York detainees with the national 9/11 detention list.

As the court of appeals explained, Respondents alleged that detainees in New York were being held in restrictive conditions of confinement, and that the only thing tying these detainees to terrorism was their religion and ethnicity. App.31a-32a. Knowing these facts, Petitioners authorized (Ashcroft) or condoned (Mueller and Ziglar) a decision to merge the New York and national detainee lists, thus

ensuring that Respondents and other New York detainees would remain in restrictive confinement, for no legitimate reason. *Id.*

Petitioners deride the court's analysis as based on speculative "premises." Ashcroft Br. 44. Not so: it was based on factual allegations and reasonable inferences—ones not present in *Iqbal*—which must be "accepted as true." *Iqbal*, 556 U.S. at 678.

First, Petitioners flatly reject paragraph 47 of the complaint: that Ashcroft, Mueller and Ziglar learned in October that the New York field office of the FBI was keeping a list of noncitizens, including Respondents, for whom the FBI had not asserted any interest or lack of interest, and against significant internal criticism Ashcroft ordered all these detainees treated as "of interest" to the 9/11 investigation, and Mueller and Ziglar complied. App.267a-268a (¶47).

Petitioners agree with Judge Raggi, "that nothing but pure speculation" links Ashcroft to the decision to merge the lists. Ashcroft Br. 45. *But what links Ashcroft to the decision is Respondents' factual allegation saying he made the decision.* Petitioners characterize the allegation as conclusory, *id.*, but it is plainly not. Determining whether an allegation is factual or conclusory does not depend on whether the truth of the allegation is merely possible or something more. *See Twombly*, 550 U.S. at 555. The claim that Petitioner Ashcroft ordered that the lists be merged is indisputably factual in the classic sense: it can be verified or not through typical means of proof. It is no different from the allegation (found to be factual, not conclusory, in *Iqbal*) that

Petitioners Ashcroft and Mueller approved the policy of holding post-9/11 detainees in highly restrictive conditions of confinement until cleared by the FBI. *Iqbal*, 556 U.S. at 681.

What DOJ Petitioners really appear to argue is that the factual allegation is *contradicted* by the OIG Report, which states that Deputy Attorney General Levey decided to merge the lists. Ashcroft Br. 45. But there is no conflict; taking Respondents' allegations as true, one can fairly infer that Levey made the decision to merge the lists based on an instruction from Ashcroft to do so. Moreover, even if there were a conflict, Respondents do not incorporate OIG conclusions that contradict the complaint. *See* App.6a, n.6.

The court of appeals' second "premise" was that Petitioners knew the FBI had not developed any connection between some of the detainees and terrorism. App.36a. This too is a factual allegation, found in paragraph 47 of the complaint. App.267a-268a (¶47). It must be accepted as true even without corroboration, but it is nonetheless strongly supported by the OIG Report. App.36a (citing JA102-06, 150-51, 218-19, 292) (New York FBI arrested all out-of-status aliens encountered—even coincidentally—in the course of investigating 9/11 leads); App.37a (citing JA109-110, 113-14) (DOJ Petitioners learned what the New York office was doing within weeks). Also supporting this "premise" are the details in the complaint regarding Ziglar's detailed daily reports to Ashcroft on persons arrested and other developments of interest, App.275a (¶¶63-64), and the requests from FBI headquarters to the

field office asking for *any* articulation of interest in Respondents, *see, e.g.*, App.304a (¶149).

DOJ Petitioners find these factual allegations "[un]likely" given the Pearson orders discussed above. Ashcroft Br. 46. But Petitioners cannot reject Respondents' factual allegations (*e.g.*, App.267a-268a, 275a (¶¶47, 63-64)), in favor of their own inferences. Even if unlikely, the allegations must be taken as true. *Twombly*, 550 U.S. at 555. Moreover, as explained above, *supra* pp. 57-58, the Pearson orders support Respondents' allegations that many detainees were arrested without any articulable interest.

Petitioners argue that they could not have known without further investigation whether detainees were connected to the terrorist attacks (Ashcroft Br. 46), but that does not change the fact that they knew there was *no* articulable basis to suspect Respondents. That they could not disprove a hypothetical connection to terrorism—one which there was no reason to hypothesize in the first place—does not meaningfully distinguish Respondents from any immigration detainee in federal custody. Petitioners knew the FBI had expressed no interest in detainees on the New York list; the decision to keep them in restrictive conditions anyway could only be justified by their race, religion, and national origin. Indeed, Petitioner Ziglar makes no apology for this disparate treatment, stating that he knew that "the persons on the New York List shared the same national origin, race, and religion with the 9/11 attackers," as if that

is sufficient on its own to justify their harsh treatment. Ziglar Br. 30-31.

Third, Petitioners cite Judge Raggi's dissent, which argued that the complaint raises only "a possibility" that DOJ Petitioners learned of the challenged conditions in the ADMAX SHU. *See* Ashcroft Br. 46 (citing App.132a-135a). But Respondents alleged that Mueller ran the investigation out of FBI Headquarters, and all three received detailed, daily reports of the arrests and detentions. App.33a (citing App.267a-268a, 275a (¶¶47, 63-65)). Based on these facts, it was reasonable to infer that DOJ Petitioners knew of the restrictive conditions of confinement at the MDC. While that is sufficient at this stage, the court of appeals went further and noted corroborating evidence in the OIG Report. App.33a-34a (citing JA45, 46, 72, 73, 221). Given the unusually close attention Petitioners paid to detainees such as Respondents, it was not just plausible to conclude that they knew of the conditions—it would have been "implausible [that] they did *not*" know. App.38a (emphasis altered). Moreover, the fair inference raised by the complaint is that Petitioners knew, and intended, that the detainees would be placed in isolation. App.274a-275a (¶¶61, 65).

Petitioners also attempt to refute their knowledge of the challenged conditions—conditions *necessary* to implement their plan of isolation—by claiming that the list-merger decision "merely preserved the pre-merger status quo, in which the majority of detainees from the New York List remained in far-less-restrictive conditions at the Passaic County Jail."

Ashcroft Br. 46-47. This argument disregards Respondents' allegations that Petitioners intended Respondents to be held in as restrictive conditions as possible, despite the absence of any evidence linking them to terrorism. App.265a, 274a-275a (¶¶41, 61). Not all detainees could be held in the ADMAX SHU because of space limitations, but that just means resource constraints limited the implementation of Petitioners' policy. App.276a (¶66). That some detainees, by fortuity, escaped the brunt of the punitive conditions ordered by Petitioners is no defense against claims brought by the rest.

Based on these factual allegations and the inferences drawn from them, the court of appeals concluded that Petitioners' decision to merge the lists, knowing that there was no reason to suspect the detainees of any connection to terrorism, and knowing of the restrictive conditions at the MDC, plausibly suggests punitive intent. App.44a. DOJ Petitioners offer no argument against this conclusion, stating only that *discriminatory* intent cannot be fairly inferred. *See* Ashcroft Br. 47-49. Nor could they; absent some non-race-based reason to suspect terrorism, the ADMAX SHU conditions were arbitrary and purposeless. App.47a. The allegations that Petitioners knowingly subjected Respondents to such arbitrary and purposeless conditions states a plausible claim of a substantive due process violation.

The court of appeal's approach to equal protection largely flowed from this same analysis. The court emphasized Respondents' factual allegations regarding the ways in which the New York FBI field

office relied upon race, religion and ethnicity, and that these practices were brought to the attention of DOJ Petitioners. App.61a-62a (citing App.266a, 328a (¶¶42, 230)); App.63a (citing App.267a-268a, 271a, 275a (¶¶45, 47, 57, 63-64)); *see also* JA102-105. In ordering or condoning the merger of the lists, DOJ Petitioners actively participated in the New York field office's discrimination, allowing an inference that Petitioners' themselves acted with discriminatory intent. App.64a (citing *Iqbal*, 556 U.S. at 683).

Petitioners argue that discriminatory intent cannot be inferred because of the presence of an obvious alternative explanation: the lists were merged because of the concern that a dangerous individual might otherwise be unwittingly released. Ashcroft Br. 48. As an initial matter, this case has nothing to do with release; the decision before Petitioners was whether to hold Respondents in the general population of the prison, or to expose them to uniquely harsh treatment in solitary confinement, despite suspecting them of nothing beyond overstaying their visa.

More fundamentally, Petitioners' argument implies that "once national security concerns become a reason for holding someone, there is no need to show a connection between those concerns and the captive other than that the captive shares common traits of the terrorist: illegal immigrant status and a perceived Arab or Muslim affiliation." App.44a. The court of appeals was correct to reject this discriminatory notion. It "rests on the assumption that if an individual was an out-of-status Arab or

Muslim, and someone called the FBI for even the most absurd reason, that individual was considered a possible threat to national security. It presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact." App.45a.

Petitioners object that this ignores *Iqbal's* distinction between "taking an action '*because of* its 'adverse effects upon an identifiable group' and doing so '*in spite of* such effects." Ashcroft Br. 48 (quoting *Iqbal*, 556 U.S. at 677). But as the court of appeals correctly recognized, the choice to treat the "interest undetermined" detainees as people of interest to the 9/11 investigation amounts to more than knowledge and acquiescence to subordinate discrimination; DOJ Petitioners joined in the discriminatory approach described by the panel above. *See also* App.64a (citing *United States v. City of New York*, 717 F.3d 72, 94 (2d Cir. 2013)).

### C. DOJ Petitioners Lack Qualified Immunity.

No reasonable federal official, much less the Attorney General of the United States, Director of the FBI, and Commissioner of the INS, could have believed in 2001 that it was constitutional to impose arbitrary or race- and religion-based group punishment, even in the name of national security. To accept Petitioners' arguments to the contrary is to revive the rightly-discarded legacy of *Korematsu v. United States*, 323 U.S. 214 (1944).

### 1. Respondents' Rights Were Clearly Established.

The fundamental question for qualified immunity is whether "[t]he contours of the right . . . [are] sufficiently clear that a reasonable official would understand that what he was doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). DOJ Petitioners unquestionably had fair warning here.

Equal protection principles have long forbidden the classification of prisoners based on race, religion and ethnicity. *See Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam); *Lee v. Washington*, 390 U.S. 333 (1968). All reasonable officials would know that "race-based government decisionmaking is categorically prohibited unless narrowly tailored to serve a compelling interest." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 752 (2007) (Kennedy, J. concurring); *see also Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The prohibition on depriving individuals of rights based on race, religion, or ethnicity has well-settled application in the specific contexts of prison and law enforcement. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (reaffirming the implicit holding of *Lee v. Washington*, that use of race in prison must be narrowly tailored to address compelling necessity); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (law enforcement need "does not justify stopping all Mexican-Americans to ask if they are aliens"); *Whren v. United States*, 517 U.S. 806, 813 (1996) ("Constitution prohibits selective enforcement of the law based on considerations such as race.").

It is likewise established that prisoners have a due process right to be free from "arbitrary and purposeless conditions of confinement" not "reasonably related" to a legitimate governmental objective. *Wolfish*, 441 U.S. at 539.

Thus, a policy of randomly singling out pretrial detainees for placement in solitary confinement would be a clear violation of substantive due process. And a claim that Black prisoners were singled out for solitary confinement would clearly violate the rights to both substantive due process and equal protection. Respondents' allegations, taken as true, are indistinguishable from such paradigmatic constitutional violations.

Petitioners correctly note that the right in question should not be defined at "[too] high [a] level of generality," such as relying on the Fourth Amendment's general prohibition of "unreasonable" searches and seizures. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("specificity is especially important" in Fourth Amendment excessive force cases). But this Court has been equally clear that qualified immunity can be overcome without a case where "the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The question is simply one of fair warning, which is provided when the case law identifies a "general constitutional rule" that applies "with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citation omitted). A right can be clearly established even if there are

"notable factual distinctions" between prior precedent and the case under review. *Id.* at 269-70.

Few legal rules apply with as obvious clarity as the prohibition on deprivations of rights motivated by race, religion, or ethnicity, and the mandate that detainees not be held in punitive conditions without justification. Indeed, DOJ Petitioners have no real quarrel with these fundamental principles, arguing instead that those rights did not clearly apply to their actions in the aftermath of 9/11. That argument is flawed and dangerous.

### 2. Respondents' Constitutional Rights Remained Clearly Established Under The Circumstances.

DOJ Petitioners argue that Respondents' rights to be free from discriminatory and punitive mistreatment were not clearly established in the "actual circumstances" Petitioners confronted. Ashcroft Br. 33. Respondents should not be viewed as "ordinary civil detainees" who might have had these constitutional rights, but as individuals who "had already been arrested pursuant to the September 11 investigation" and "subjected to the hold-until-cleared policy," which purportedly made their detention in restrictive conditions not "arbitrary and purposeless to national security." *Id.* This circular argument—Respondents were treated as if they posed a security threat, so it was reasonable to treat them as security threats—is foreclosed by the complaint.

The complaint plausibly alleges that Petitioners subjected civil detainees to restrictive confinement based on race, religion and ethnicity, *knowing* the FBI lacked an articulable basis to suspect them of any connection to terrorism. *See supra* Section I.B. Taking these factual allegations as true, Respondents *were* ordinary immigration detainees, suspected only of violating the immigration law. That Petitioners *treated* them differently cannot change the clearly established nature of their rights; the differential treatment is the gravamen of Respondents' claims.

Petitioners apparently assume that a policy of *knowingly* subjecting Muslim men of Arab or South Asian descent to harsh treatment, without individualized suspicion, could have been "justified" by an appeal to national security. Ashcroft Br. 33. But under the facts as alleged, it cannot. Petitioners point out that "other detainees *charged with* or *convicted of* terrorism-related offenses had incited acts of violence outside prisons and had carried out violent attacks inside prisons." *Id.* (emphasis added). For anyone falling in that category, however, there was already probable cause (or much more) to suspect a terrorism connection. For Respondents, there was not, and Petitioners are alleged to have known that fact. The suggestion that Respondents are in the same category as these "other detainees" is not a defense to claims of illegitimate racial profiling—it is an embrace of it.

Petitioners make the same mistake in urging that they were reasonably attempting to "limit[] the risk" that Respondents might be an "as-yet-unidentified

terrorist associate." Ashcroft Br. 34 (quoting App.143a). Taking as true the allegation that Petitioners knew there was no reason to suspect these men of terrorism, Respondents were no different than any ordinary immigration detainee—except they appeared to be Arab or Muslim.

While Petitioners attempt to keep their defense of race-based treatment implicit, they cite to the call of the dissenting judge to recognize an "inherent difficulty in identifying in advance of . . . investigation" who among a group of out-of-status non-citizens "within the same ethnic and religious group as the hijackers" "might have terrorist connections." App.140a-141a; *see* Ashcroft Br. 33. Any asserted difficulty in distinguishing peaceful Muslims of Arab descent who worked without a visa, from Muslims of Arab descent who violated the immigration law to carry out terrorist attacks, cannot justify treating the entire group as suspect. Such an argument "presumes, in essence, that all out-of-status Arabs or Muslims were potential terrorists until proven otherwise. It is built on a perception of a race and faith that has no basis in fact." App.45a.

This logic is not without precedent:

> [The] exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was *impossible to bring*

> *about an immediate segregation of the disloyal from the loyal* that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin.

*Korematsu*, 323 U.S. at 218-19 (emphasis added).

No one doubts that *Korematsu* arose in a time of genuine crisis when national security concerns were paramount. Yet this Court has long made clear that *Korematsu* was wrongly decided, and that the racial classification adopted as a response to World War II security concerns was nonetheless "illegitimate." *Adarand Constructors v. Pena*, 515 U.S. 200, 236 (1995). Long before 2001, it should have been clear to reasonable federal officers that racial and religious classifications are not a valid response to any perceived difficulty in separating the loyal from the disloyal.

Petitioners also contend that even if Respondents were "ordinary" detainees, it was not clearly unconstitutional to place them in restrictive conditions without individualized suspicion. Ashcroft Br. 35. Their support for this theory is that prisons have been permitted to uniformly deny contact visits to pretrial detainees, *Block v.*

*Rutherford*, 468 U.S. 576 (1984), or require searches of all detainees or arrestees, *Wolfish*, 441 U.S. at 558; *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 132 S. Ct. 1510, 1523 (2012). It does not follow that *any* level of restriction may be imposed without individualized need. Plainly no prison system could place all of its civil detainees in solitary confinement. And it certainly could not decide which detainees to subject to solitary confinement arbitrarily, or on the basis of race.

Finally, the existence of dissenting votes from the petition for rehearing en banc does not show that Respondents' rights were not clearly established. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 378 (2009) (differing views of judges, even groups of judges, does not entitle a party to qualified immunity). While judicial disagreement over whether a right exists may be relevant to the question of whether it is clearly established, *see al-Kidd*, 563 U.S. at 743, disagreement over whether to recognize qualified immunity cannot demonstrate that the right is not clearly established. In other words, reasonable jurists can disagree about whether an official's conduct was reasonable. If the rule were different, a court could only deny qualified immunity by unanimous vote.[17]

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[17] Similarly, the OIG Report, which is not a legal precedent, does nothing to contradict the clearly established nature of Respondents' rights. Indeed, although the OIG found the merger of the list "supportable," JA153, it more relevantly concluded that the restrictive conditions Respondents faced were not, JA302.

In making factual arguments at odds with the complaint, Petitioners illustrate that their request for qualified immunity is premature. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (inferences are drawn in favor of non-movant when assessing clearly established prong of qualified immunity). Once Petitioners are able to introduce *evidence* of why they did what they did, the lower courts will be able to determine whether they acted reasonably or in violation of clearly established rights. But until that evidence is brought forward, Respondents' factual allegations control, and they state clear and longstanding violations of the Constitution.

## II. Claims Against The MDC Petitioners Survive A Motion To Dismiss.

Respondents bring distinct claims against Petitioners Hasty and Sherman, who were directly responsible for the harsh conditions they faced in MDC's ADMAX SHU. These claims survive the pleading stage, and would do so even if the Court were persuaded that the claims against DOJ Petitioners should be dismissed.

### A. A *Bivens* Remedy Is Available Against MDC Petitioners.

MDC Petitioners make the same general *Bivens* arguments as DOJ Petitioners, and they fail for the same reasons. *Supra* Section I.A. Indeed, the arguments have little force in the context of abuse and discrimination by the warden and associate warden of a federal prison. In *Carlson*, this Court held that a *Bivens* remedy was available against the Director of the Federal Bureau of Prisons in a claim

regarding the failure to provide a *single* prisoner with constitutionally adequate medical care. 446 U.S. at 16 n. 1, 18-23. There is no reason to deny a remedy for MDC Petitioners' failure to securely and humanely detain the individuals in their care.

First, the complaint alleges that Hasty allowed and actively facilitated physical and verbal abuse of Respondents by MDC's correctional officers. *See infra* Section II.B. Every judge who has considered the issue has agreed that this claim of deliberate indifference to "unofficial abuse" arises in a familiar *Bivens* context. *See* App.24a-27a, 148a n.41 (Raggi, J., dissenting); App.241a (dissent from denial of rehearing en banc) (incorporating Judge Raggi's opinion). To hold otherwise would mean that a federal prison warden can encourage abuse of detainees without meaningful deterrence by the courts.

Respondents' Fourth Amendment claim similarly requires no extension of *Bivens*. *Bivens* itself involved a challenge to an unreasonable search and seizure by a federal official, 403 U.S. at 389-90, and this Court has subsequently considered many other Fourth Amendment fact patterns without questioning the availability of a *Bivens* remedy. *See, e.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011) (challenge to pretextual detention as material witness); *Groh v. Ramirez*, 540 U.S. 551, 563-64 (2004) (unlawful search claim); *Wilson v. Layne*, 526 U.S. 603, 606-608 (1999) (challenge to execution of arrest warrant).

As for Respondents' equal protection and substantive due process challenges to the "official"

conditions, *see infra* Section II.B.2, MDC Petitioners insist that the relevant "context" must be defined extremely narrowly: jailors who initially believed they would be holding detainees with suspected ties to terrorism, then eventually learned that the FBI lacked any individualized suspicion. Hasty Br. 25. Regardless of the factual problems with this theory, *infra* pp. 82-86, if this sort of detail required an extension of *Bivens*, so would every fact-intensive defense a prison official could raise. This Court has never suggested such an unpredictable approach. *See Farmer*, 511 U.S. at 830, 848-49 (applying *Carlson*, a case involving medical care, to a claim involving risk of harm to transgender prisoners).

MDC Petitioners had no role in setting "high-level policy . . . implicating both national security and immigration" (Ashcroft Br. 18), so they cannot bootstrap these alleged special factors to avoid *Bivens* liability. Nor is there any merit to their new argument that being a low-level implementer of a policy is its own "special factor." Hasty Br. 32. Hasty was the warden of the MDC, directly responsible for the humane treatment and security of all prisoners, and Sherman was his associate warden. As explained below, they created the challenged conditions of confinement, despite receiving detailed information about why Respondents were arrested and just how (un)interested in them the FBI was. Then they lied to conceal their failure to follow BOP policy. If they have a defense for good-faith reliance on valid superiors' orders, it would be available under the qualified immunity doctrine. *But see infra* pp. 86-89. There is no basis for a separate *Bivens* exception.

Finally, MDC Petitioners argue that Congress' "decision not to provide a remedy" is also a special factor counseling hesitation. Hasty Br. 33. But general congressional inaction cannot itself be a special factor; it is the starting point to any *Bivens* analysis. That may be why DOJ Petitioners advance no such argument. MDC Petitioners' only support for this argument is Judge Raggi's dissent, which identified the OIG reports as authorized by the USA PATRIOT Act. Hasty Br. 33 (citing App.115a-117a). But Petitioners do not explain how those reports "provide roughly similar incentives for potential defendants to comply with the [Constitution] while also providing roughly similar compensation to victims of violations." *Minneci*, 565 U.S. at 130. Nor is there any basis to conclude that Congress considered and rejected a damages remedy; to the contrary, Congress was repeatedly informed of the ongoing *Bivens* litigation. JA45-46, 46 n.4, 187; *see* Lessons Learned–The Inspector General's Report on the 9/11 Detainees: Hearing Before the S. Comm. on the Judiciary, 108th Cong. (2003), 2003 WL 21470415 (Fine, Glenn testifying) (noting that abuse, prolonged detention, communications restrictions are subject of ongoing litigation). Nothing Congress did manifested "the clearly discernible will" that claims against the warden and associate warden of the MDC should not proceed. *Davis*, 442 U.S. at 247.

In short, there is nothing to distinguish Respondents' claims—that MDC Petitioners subjected them to unduly restrictive conditions, searched them unlawfully, discriminated against them, and allowed their abuse—from thousands of similar claims brought against prison guards and

supervisors every year. These claims, which fall within *Bivens*' core purpose, should proceed.

### B. Respondents State Plausible Claims That MDC Petitioners Violated Their Clearly Established Rights.

The court of appeals correctly held that Respondents' substantive due process, equal protection, and Fourth Amendment claims against MDC Petitioners are plausible, and state clearly established constitutional violations. That decision should be affirmed.

#### 1. Hasty Is Liable For Subjecting Respondents To "Unofficial" Abuse.

The complaint alleges that MDC correctional officers engaged in a widespread pattern of physical and verbal abuse. *See* App.289a-292a, 300a, 303a, 307a, 319a (¶¶104-105, 109-110, 136, 147, 162, 200, 201); *see also* JA336-416 (Supplemental OIG Report). Hasty encouraged this abuse by referring to Respondents as "terrorists" among MDC staff, barring them from normal grievance and oversight procedures, and purposely avoiding the unit. App.259a-260a, 280a-281a, 291a-292a, 301a (¶¶24, 77, 109, 140). Though he tried to avoid being confronted with the results of these actions, he was made aware of the abuse nonetheless. App.259a, 280a-281a, 287a, 291a, 293a, 296a-297a, 300a (¶¶24, 77-78, 97, 107, 114, 123, 126, 137). As every judge who has considered the issue has agreed, these allegations state a plausible claim of deliberate indifference. App.201a. (district court decision);

App.54a-57a, 148a n. 41 (Raggi, J., dissenting); App.241a (dissent from en banc denial) (incorporating Judge Raggi's opinion).

Hasty disagrees. He misleadingly asserts that the OIG "concluded" that "none of the abuse 'was engaged in or condoned by anyone other than the correctional officers who committed it.'" Hasty Br. 54-55 (citing JA299 n.130). In fact, the passage he cites notes that the investigation had found no evidence of superior officer culpability "to date," but that the "investigation [wa]s ongoing." *Id.* What matters is not OIG's non-conclusion, but Respondents' well-pleaded complaint.

In response to Respondents' allegation that Hasty willfully blinded himself to abuses by neglecting to make rounds as required by BOP policy (App.260a (¶24)), Hasty presents the "obvious alternative explanation" that he had to delegate authority during that time. Hasty Br. 55-56. This unsworn statement is not "obvious" at all, but more importantly, it contradicts a specific allegation in the complaint and cannot be credited at this stage.

Hasty also insists that the allegation that he was "made aware" of the abuse is too general. Hasty Br. 55 (citing App.259a-260a (¶24)). Yet he disregards detailed allegations about *how* he was made aware. *See* App.260a (¶24) ("by inmate complaints, staff complaints, hunger strikes, and suicide attempts"); App.280a (¶77) (by logs, other official documents, videotapes and detainee complaints); App.291a (¶107) (by numerous complaints about abuse); App.292a (¶110) (by a complaint from Hammouda and other detainees about verbal abuse and assault);

App.300a (¶¶136-137) (by complaints about interference with religious practice).

According to Hasty, none of these allegations matters because there is no allegation that any subordinate informed him of any unaddressed guard misconduct. Hasty Br. 55. This is also contradicted by factual allegations. *See* App.281a (¶78) (staff memo to Hasty detailing detainees' complaints, resulting not in any action but in harassment against the whistleblower); App.291a (¶107) (Hasty's failure to investigate allegations of abuse).

Hasty blames his guards for making it difficult for detainees to file complaints, Hasty Br. 56, but the complaint and OIG Report establish that Hasty deserves at least some of the blame. *See* JA276-78 (MDC policy initially forbade detainees' retention of facility handbook in cell); App.279a-280a (¶¶75-76) (policy requested and approved by Hasty prohibited detainees from keeping any property in their cell). Finally, Hasty ignores altogether the allegation that he referred to the detainees as "terrorists," when they were not even "suspected terrorists." *See* App.57a (citing App.280a-281a, 291a-292a (¶¶77, 109)).

As every judge on the Second Circuit who has considered this claim recognized, these allegations suggest that Hasty not only ignored abuse, but actively encouraged it. App.56a, 148a n. 41, 241a. The claim survives.[18]

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[18] Hasty wisely does not claim qualified immunity for this clearly unconstitutional abuse.

### 2. Sherman And Hasty Are Liable For The "Official" Conditions Of Confinement.

Hasty and Sherman are both liable for the MDC conditions established as a matter of "official" policy. Hasty ordered his subordinates to develop uniquely harsh conditions, and he and Sherman approved those conditions. App.259a-261a, 276a-277a, 279a-281a, 287a-288a, 299a (¶¶24, 26, 27, 68, 75-76, 79, 98, 132). These conditions, described in detail in the complaint, included 23-24 hours-a-day lockdown in a cell in the ADMAX SHU, the most restrictive unit in the federal prison system; handcuffs, shackles, a waist chain, and the physical grip of at least three guards whenever Respondents were taken from their cells; redundant and humiliating strip searches; restrictions on all forms of communication; denial of recreation; inadequate provision of hygiene and religious items; constant illumination; sleep deprivation; exposure to temperature extremes; and failure to provide information about internal complaint policies. App.281a-301a (¶¶79-140). The court of appeals correctly held that imposition of these conditions on individuals with no legitimate connection to the terrorism investigation, but rather based on religion, race and ethnicity, plausibly state substantive due process and equal protection claims. App.50a-54a; *see also Iqbal*, 556 U.S. at 684 ("[W]e express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here.")

Hasty and Sherman respond that Respondents have not alleged conditions unrelated to legitimate penological interests or motivated by discriminatory animus. They argue that the complaint fails to "overcome the obvious alternative explanation—that Hasty and Sherman were complying with the FBI's terrorism designations and BOP policies." Hasty Br. 47. As an initial matter, mere speculation about possible lawful explanations cannot defeat detailed allegations that support a plausible claim. *Supra* Section I.B. But even on its own terms, there are several problems with Petitioners' factual argument.

First, the "FBI terrorism designations" Petitioners invoke do not exist on the face of the complaint or OIG reports. Rather, the complaint alleges that all Muslim, Arab, and South Asian non-citizens arrested for immigration violations as the result of a 9/11-related lead were treated as "of interest" to the terrorism investigation, *without* any determination by the FBI or anyone else that there was any reason to suspect them of a connection to terrorism. App.265a-268a (¶¶40-41, 43-47, 49). The OIG Report confirms that these detainees were treated as "of interest" even if they were merely encountered while following a different lead. JA66, 150-51.

What MDC Petitioners did receive from the FBI were regular written updates summarizing how each detainee came to be considered "of interest," and evidence relevant to the threat each might pose to the institution. App.277a (¶69). For example, they were told Khalifa was arrested because he was "encountered by INS" while following an FBI lead

and charged with an immigration violation, and that the "FBI *may* have an interest in him." App.277a-278a (¶70) (emphasis added); *see also* App.278a-279a (¶¶71-73). Any such "interest" proved minimal. *See e.g.*, App.319a-320a (¶202) (Khalifa interviewed once by FBI, in early October); *see also* App.304a (¶150) (Abbasi interviewed once by FBI, in mid-October); App.309a (¶168) (Mehmood never interviewed by FBI). Unsurprisingly, MDC Petitioners concluded that Respondents were not terrorists, but merely immigration detainees. App.279a (¶74). [19]

Because the official information from the FBI included no indication that restrictive conditions were appropriate, there was nothing to which to "defer." MDC Petitioners argue there was no reason to believe the FBI was sending all the information it knew about detainees to the MDC. Hasty Br. 49.[20] But a complaint is not required to provide

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[19] By "terrorism designations," MDC Petitioners may be referring to the information shared at DOJ Petitioners' instruction, that the "detainees were suspected terrorists" who needed to "be encouraged in any way possible to cooperate." App.274a-275a (¶61). But discovery has not yet disclosed how this information was shared with law enforcement, or what MDC Petitioners made of it, in light of the other information they received. It is inappropriate, pre-discovery, to resolve the relative responsibility of different groups of defendants, each alleged to have played a discrete role in discrimination and abuse, on the basis of unsworn finger-pointing.

[20] Petitioners baldly state that the updates contained evidence relevant "only" to the risk the detainees posed to the MDC (Hasty Br. 49), but this ignores the allegation, which clearly states that the updates also contained "summaries of the reason each detainee was arrested." App.277a (¶69).

explanations as to why particular defendants would believe particular things—the complaint alleges that MDC Petitioners knew that the FBI lacked evidence connecting the detainees to terrorism based on the information being provided to them. App.277a (¶69). Petitioners may testify in the future that they suspected they were denied some relevant information, but they certainly cannot establish this at the motion to dismiss stage.

Second, the complaint contradicts Petitioners' explanation that they were merely following "binding" BOP policy. *See, e.g.*, Hasty Br. 40. DOJ Petitioners ordered isolation and "maximum pressure," App.274a-275a (¶61), which was itself unconstitutional under the circumstances. *Supra* Section I.B.1.b. BOP Headquarters may have ordered placement in restrictive conditions in reliance on this illegal instruction, but Hasty and Sherman designed the specific conditions themselves, and in doing so went far beyond what BOP policy permitted.

For example, disciplinary segregation required a charge of a rule violation, 28 C.F.R. § 541.21 (2001), and administrative detention would be proper only for 30 days to investigate security risks. *Id.* § 541.22; JA241-42. Respondents' treatment fit neither policy. Yet MDC Petitioners combined disciplinary and administrative segregation to create new, highly restrictive conditions with none of the associated procedural protections. App.276a-277a (¶68); JA238.

Under MDC Petitioners' policy, Respondents were prohibited from keeping hygiene supplies in their cells (App.298a (¶130)); subjected to 24-hour

illumination and loud bar-taps on their cell doors through the night, depriving them of sleep (App.295a (¶¶119, 120)); denied clothing warm enough for them to "recreate" one hour a day, in a barren cage open to the elements (App.296a, 297a (¶¶122, 126)); denied warm clothes and blankets in their cells (App.297a (¶127)); denied copies of the Koran (App.299a (¶132)); denied telephone calls and visits (App.281a-283a (¶¶79, 83, 85)); and their attorney client visits, once they occurred, were video- and audio-taped (App.287a-288a (¶¶98, 99)). These innovations, too, contravened policy. *See* 28 C.F.R. § 541.22 (2001) (disciplinary segregation cells must be appropriately heated, segregated inmates must have opportunity to maintain appropriate level of hygiene, exercise must be permitted, religious reading material must be permitted); *id.* § 543.13(e) (auditory supervision of attorney client visits prohibited).

Such unusually restrictive conditions, imposed upon individuals whom the FBI *might* be interested in, and whom MDC Petitioners came to understand were mere immigration violators, are so arbitrary as to suggest punitive intent. As the court of appeals correctly held, this intent is corroborated by MDC Petitioners' creation of a memorandum falsely stating that the "suspected terrorists" were "classified" as "High Security" based on an individualized assessment of their "precipitating offense, past terrorist behavior, and inability to adapt to incarceration." App.53a (*citing* App.279a (¶74)). In reality, no one considered any such information, and it squarely conflicts with the

information about Respondents that was actually provided. App.277a-278a (¶¶69-73)).[21]

This mendacity also provides a basis to infer that MDC Petitioners "approved the false document to justify detaining actual or perceived Arabs and Muslims in the harsh conditions of the ADMAX SHU based on discriminatory intent." App.69a; *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000) ("trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up discriminatory purpose"). Discriminatory intent is further buttressed by MDC staff's use of racially, ethnically, and religiously charged language to refer to Respondents. *See* App.71a-72a, 291a-292a, 300a, 303a, 324a (¶¶109-10, 136, 147, 218); JA268, 384. Use of these terms was brought to Petitioners' attention, and Hasty himself referred to Respondents as "terrorists." App.280a-281a, 291a-292a (¶¶77, 109); *see also* App.73a.

Given these factual allegations, MDC Petitioners' claim to qualified immunity also falls flat. The

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[21] MDC Petitioners object to the emphasis the court placed on the memorandum, arguing that it merely reports that *someone* classified the detainees as "high security," not necessarily the wardens. Hasty Br. 49-50. The memorandum has a comma that renders it difficult to read, but certainly may be read to claim falsely that terrorism determinations were made at MDC. Hasty Pet. App., No. 15-1363, at 467a ("The Executive staff at the MDC Brooklyn have determined the suspected terrorists, have been classified as High Security inmates . . . ."). On a motion to dismiss, Petitioners are not entitled to the reading of the memorandum that most helps their cause. Regardless, what is most significant is not *who* classified the detainees, but the patently false statement about *how* they were classified. *Id.*

question is not whether there was a pre-2001 case establishing that prison wardens must ignore "FBI terrorism designations." Hasty Br. 35. The question is whether a reasonable warden could have thought it lawful to hold immigration detainees for months in the extremely restrictive conditions they crafted, based on the fact that the FBI *might* be interested in them, even after learning there was no individualized basis for suspicion that they posed a danger. The answer is clearly no.

Prolonged placement in the ADMAX SHU, in ultra-restrictive conditions, violated BOP policy. *Supra* pp. 84-85. While a policy prohibiting conduct does not clearly establish its illegality, in combination with precedent, it can be relevant to the question of fair warning. *See Hope*, 536 U.S. at 743-44 (relying in part on regulations prohibiting challenged conduct to find fair warning); *cf. Layne*, 526 U.S. at 617 (policy allowing conduct in question relevant to lack of fair warning). Precedent, like BOP policy, clearly established that detainees may not be subjected to punitive conditions (like segregation) without a justification. *See Wolfish* 441 U.S at 535-39, 539 n.20.[22] And some of the conditions Petitioners imposed were clearly unconstitutional in any circumstance. *See Campbell*

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[22] Restrictive confinement may be lawful in some circumstances, but *Wolfish* does not support weighing justifications at the motion to dismiss stage—in *Wolfish*, the Court had before it an extensive record, including affidavits recounting undisputed facts, the district court's prison visits, over a month of trial testimony, deposition testimony, and post-trial memoranda and affidavits. *See United States ex rel. Wolfish v. Levi*, 439 F. Supp. 114, 119 (S.D.N.Y. 1977).

*v. Meachum*, No. 96-2300, 1996 U.S. App. LEXIS 29456, at *11 (2d Cir. Nov. 4, 1996) (failure to provide an inmate with adequate toiletry articles states an Eighth Amendment violation); *Gaston v. Coughlin*, 249 F.3d 156, 164-65 (2d Cir. 2001) (exposure to cold states an Eighth Amendment violation); *Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996) (Eighth Amendment requires meaningful opportunity to exercise).

Even if MDC Petitioners could show that *all* the restrictive conditions—lack of hygiene supplies, exposure to cold, sleep deprivation, etc.—were based on orders from BOP headquarters, it is not reasonable for an officer to follow a clearly unlawful order. *See, e.g., Malley v. Briggs*, 475 U.S. 335, 339-40 (1986) (rejecting officer's claims to qualified immunity based on his reliance on a magistrate's issuance of a warrant); *Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) (officer was not entitled to qualified immunity for his reliance on advice of his superiors that was not plausibly valid).

The claim that MDC Petitioners reasonably believed it lawful to treat these civil detainees so harshly is also belied by their creation of the false memorandum, described above, and by their failure to follow the BOP's reporting requirements for detainees held in administrative detention. BOP regulations required that such detainees receive weekly reviews and monthly hearings regarding the continued need for segregation. 28 C.F.R. § 541.22(c) (2001). MDC Petitioners ordered these requirements bypassed. App.276a-277a (¶68). "A course of conduct that tends to prove that the requirement

was merely a sham, or that [prison officials] could ignore it with impunity, provides . . . strong support for the conclusion that they were fully aware of the wrongful character of their conduct." *Hope*, 536 U.S. at 744.

Finally, even if prolonged ADMAX SHU placement were not clearly unlawful in light of the FBI's "interest," Petitioners fail to explain how it could possibly be lawful to continue to hold several Respondents in isolation for months *after* they were cleared by the FBI of any connection to terrorism. *See* App.315a-316a, 322a, 326a-327a (¶¶188, 211, 226, 227) (Benatta, Khalifa, and Hammouda held in ADMAX 168, 28, and 149 days, respectively, after clearance by headquarters).

For all of these reasons, Respondents' challenge to the "official" abuse crafted by MDC Petitioners survives a motion to dismiss.

### 3. Sherman And Hasty Are Liable Under The Fourth Amendment For Unreasonable Strip Searches.

The complaint also plausibly alleges unreasonable strip searches. MDC Petitioners argue that no facts were alleged showing they reviewed or approved the unwritten strip search policy. Hasty Br. 52. The Second Circuit correctly concluded otherwise. App.77a-78a. The complaint alleges that defendant Cuciti, one of Petitioners' subordinates, was tasked with "developing the strip-search policy on the ADMAX [SHU]," and that Hasty personally ordered him to design "extremely restrictive conditions of confinement." App.279a, 292a (¶¶75,

111). These allegations support the reasonable inference that Hasty ordered Cuciti to develop the strip-search policy, which was then approved and implemented by Hasty and Sherman. App.77a.

MDC Petitioners assert that the strip search policy was reasonably related to legitimate penological interests. Hasty Br. 53. But the complaint's specific factual allegations, taken as true, show it was not. App.292a-295a (¶¶111-17). Respondents allege "that they were strip searched when there was no opportunity to acquire contraband, including in instances where they were shackled and under escort, or were never permitted to leave their cells," creating a reasonable inference that no legitimate interest justified the strip searches. App.78a n.44.

MDC Petitioners also argue that Judge Raggi's dissent shows that the rights in question were not clearly established. Hasty Br. 43. Again, the fact of a dissenting opinion on the question of qualified immunity does not itself mean qualified immunity must apply—particularly when there is strong precedent supporting the right. *See Redding*, 557 U.S. at 378; *supra* p. 73. In 2001, it was clearly established in the Second Circuit that random and repeated strip searches are not reasonably related to legitimate government purposes. *See Hodges v. Stanley*, 712 F.2d 34, 35 (2d Cir. 1983).[23]

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[23] Judge Raggi's Fourth Amendment analysis was based on the premise that Respondents failed to plead immediately successive strip searches. App.160a. Respondents do allege such searches. App.292a-293a (¶112) (detainees searched upon arrival to MDC, escorted by four guards in handcuffs and

The Fourth Amendment claim against MDC Petitioners should proceed.

## III. Respondents State a Claim under 42 U.S.C. § 1985(3).

Respondents' final claim is that all Petitioners conspired to deprive them of the equal protection of the laws under 42 U.S.C. § 1985(3). Petitioners argue that they are entitled to qualified immunity on this claim because it was unclear in 2001 that section 1985(3) applied to federal officials.[24] Ashcroft Br. 38-39; Ziglar Br. 19-20; Hasty Br. 43-44.

Petitioners ask this Court to hold that even if they knew that it was wrong to engage in unconstitutional discrimination, they could not have known that it was wrong to conspire to do so. Such a defense does not serve the policies underlying qualified immunity. Qualified immunity is designed to give officials room to make "reasonable but mistaken judgments," *al-Kidd*, 563 U.S. at 743, but not to shield them when "the unlawfulness of the alleged conduct should have been apparent," *Hope*, 536 U.S. at 743. "[F]ederal officials could not have reasonably believed that it was legally permissible for them to conspire with other federal officials to deprive a person of equal protection of the laws." App.83a (quoting *Hasty*, 490 F.3d at 177).

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shackles to the ADMAX SHU, and immediately searched again); JA392-93 (describing successive strip searches).

[24] It is unquestionably clear today. *See Hasty*, 490 F.3d at 176-77.

Petitioners respond by quoting two decisions of this Court, *Davis v. Scherer*, 468 U.S. 183 (1984), and *Elder v. Holloway*, 510 U.S. 510 (1994), out of context. *Davis* and *Elder* stand for the proposition that a defendant who does not violate a clearly established "federal right on which the claim for relief" is based is entitled to qualified immunity, even if his actions violate some other "clearly established duty." *Elder*, 510 U.S. at 515. Thus, that a defendant violated a state regulation was insufficient to sue on an alleged conspiracy to violate a due process right to a hearing, which was not clearly established. *Davis*, 468 U.S. at 195-96; *Elder*, 510 U.S. at 515. As long as the *federal right* is clearly established (here, the equal protection violation), there is no need for specific recognition of the mode of liability (conspiracy).

Finally, MDC Petitioners contend that employees of the Justice Department cannot conspire with one another, citing cases involving alleged conspiracies between private corporations and their corporate officers and directors. Hasty Br. 44. But this intra-corporate shield is at best limited to single corporate entities (together with wholly-owned subsidiaries) acting exclusively through their boards of directors and agents within their official capacities. App.82a. Official acts of the aforementioned individuals are attributed to the corporate entity, so a rule that none may be held to conspire with the others may make sense.[25] But such a rule would be wholly

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[25] *But cf. Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 372 n.11 (1979) ("[W]e assume but certainly do not

inappropriate for *public* officials, sued in their *individual* capacities for actions alleged to be *outside of their authority*, working for a vast federal bureaucracy. The court of appeals found a number of these distinguishing inquiries to be so fact-intensive (and, perhaps, so weakly developed by Petitioners) that it would not be able to decide the issue as a matter of law, and appropriately remanded for further consideration by the district court. App.83a.

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decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3).").

## CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,


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